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IN THE

SUPREME COURT OF THE UNITED STATES

Term 1975

NO. 74-6257

TROY LEON GREGG

Petitioner

-v-

STATE OF GEORGIA

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

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ATTORNEY FOR PETITIONER

IN THE

SUPREME COURT OF THE UNITED STATES

TROY LEON GREGG)

Petitioner)

Vs.)

THE STATE OF GEORGIA)

Respondent)

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Georgia entered on October 17, 1974, rehearing denied, October 29, 1974.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Georgia is reported at 233 Ga. 117 (1974) and is set out in Appendix A hereto, pp. 1a - 14a, infra.

JURISDICTION

The judgment of the Supreme Court of the State of Georgia was entered on October 17, 1974, and is set out in Appendix A hereto. An order extending the time for filing this petition for writ of certiorari to and including March 28, 1975 was signed by Mr. Justice Powell, Associate Justice of this Court, on February 5, 1975. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether probable cause for a subsequent warrantless arrest may be satisfied through information received from an informant who had not seen the commission of the crimes for which the arrest was made or any previous criminal or incriminating conduct on the part of the person arrested, and who had never been an informant in the past?

2. Whether a waiver of rights executed after the administration of the Miranda warnings and at the time of arrest applies to custodial interrogation sessions held a matter of hours after arrest, where the person executing the waiver was neither interrogated at the time he was warned nor interrogated in the subsequent sessions by the same officers who had administered the Miranda warnings to him?

3. Whether the totality of the circumstances under which a confession made by petitioner was obtained rendered the confession involuntary in violation of the Due Process of Law guaranteed by the Constitution of the United States?

4. Whether the imposition and carrying out of the sentence of death for the crime of murder under the law of Georgia violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

5. Whether the provisions for appellate review of death sentences established by the new Georgia capital punishment statute, Georgia Laws 1973, pp. 159-172, Act No. 74, violate the rights of an indigent defendant to the effective assistance of counsel guaranteed by the Sixth Amendment to the Constitution of the United States and to the Due Process o. Law and Equal Protection of the Laws guaranteed by the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the Code of Georgia:

Ga. Code Ann. §26-1101

"Murder (a)...[A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

"(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

"(c) A person convicted of murder shall be punished by death or by imprisonment for life."

Ga. Code Ann. §26-1902

"Armed Robbery A person commits armed robbery when with intent to commit theft, he takes property of another from the person or the immediate presence of another by use of an offensive weapon. The offense robbery by intimidation shall be a lesser included offense in the offense of armed robbery. A person convicted of armed robbery shall be punished by death or imprisonment for life, or by imprisonment for not less than one nor more than 20 years."

Ga. Code Ann. §26-3102

" Capital offenses; jury verdict and sentence. Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstances and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty."

Ga. Code Ann. §27-2302 (1973)

" Recommendation to mercy. In all capital cases, other than those of homicide, when the verdict is guilty, with a recommendation to mercy, it shall be legal and shall mean imprisonment for life."

Ga. Code Ann. §27-2514

" Sentence of death; copy for penitentiary-superintendent. Time and mode of conveying prisoner to penitentiary. Expenses. Upon a verdict or judgment of death made by a

"jury or a judge, it shall be the duty of the presiding judge to sentence such convicted person to death and to make such sentence in writing, which shall be filed with the papers in the case against such convicted person, and a certified copy thereof shall be sent by the clerk of the court in which said sentence is pronounced to the superintendent of the State penitentiary, not less than 10 days prior to the time fixed in the sentence of the court for the execution of the same; and in all cases it shall be the duty of the sheriff of the county in which such convicted person is so sentenced, together with one deputy or more, if in his judgment it is necessary, and provided that in all cases the number of guards shall be approved by the trial judge, or if he is not available, by the ordinary of said county in which such prisoner is sentenced, to convey such convicted person to said penitentiary, not more than 20 days nor less than two days prior to the time fixed in the judgment for the execution of such condemned person, unless otherwise directed by the Governor, or unless a stay of execution has been caused by appeal, granting of a new trial, or other order of a court of competent jurisdiction, and the expense for transporting of said person to the penitentiary for the purpose of electrocution shall be paid by the ordinary of the county wherein the conviction was had, or the board of county commissioners, the county commissioner, or other person or persons having charge of the county funds, out of any funds on hand in the treasury of such county."

Ga. Code Ann. §27-2534.1

" Mitigating and aggravating circumstances; death penalty.- (a) The death penalty may be imposed for the "the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or Kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney

"or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the [statutory] aggravating circumstances enumerated in Code section 27-2534.1(b) is so found, the death penalty shall not be imposed."

"Ga. Code Ann. §27-2537

" Review of death sentences.- (a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed, and the report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Code section 27-2534.1(b), and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

"(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for re-sentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The Court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

(h) The office of the Assistant shall be attached to the office

"of the Clerk of the Supreme Court of Georgia for administrative purposes.

(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."

Georgia Laws, 1973, p. 162, Act No. 74

"At the conclusion of all felony cases heard by a jury, and after argument of counsel and proper charge from the court, the jury shall retire to consider a verdict of guilty or not guilty without any consideration of punishment. In non-jury felony cases, the judge shall likewise first consider a finding of guilty or not guilty without any consideration of punishment. Where the jury or judge returns a verdict or finding of guilty, the court shall resume the trial and conduct a pre-sentence hearing before the jury or judge at which time the only issue shall be the determination of punishment to be imposed. In such hearing, subject to the laws of evidence, the jury or judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any such prior criminal convictions and pleas; provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The jury or judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed.

"The prosecuting attorney shall open and the defendant shall conclude the argument to the jury or judge. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions and the jury shall retire to determine the punishment to be imposed. In cases in which the death penalty may be imposed by a jury or judge sitting without a jury, the additional procedure provided in Code section 27-2534.1 shall be followed. The jury, or the judge in cases tried by a judge, shall fix a sentence within the limits prescribed by law. The judge shall impose the sentence fixed by the jury or judge, as provided by law. If the jury cannot, within a reasonable time, agree to the punishment, the judge shall impose sentence within the limits of the law; provided, however, that the judge shall in no instance impose the death penalty when, in cases tried by a jury, the jury cannot agree upon the punishment. If the trial court is reversed on appeal because of error only in the pre-sentence hearing, the new trial which may be ordered shall apply only to the issue of punishment."

Georgia Laws, 1973, p. 171, Act No. 74

"Any person who has been indicted for an offense punishable by death may enter a plea of guilty at any time after his indictment, and the judge of the superior court having jurisdiction may, in his discretion, during term time or vacation, sentence such person to life imprisonment, or to any punishment authorized by law for the offense named in the indictment. Provided, however, that the judge of the superior court must find one of the statutory aggravating circumstances provided in Code section 27-2534.1 before imposing the death penalty except in cases of treason or aircraft hijacking."

STATEMENT

This is a petition for a writ of certiorari to review the judgment of the Supreme Court of Georgia, entered on October 17, 1974, affirming petitioner's two death sentences for the offenses of murder while setting aside and remanding for resentencing petitioner's two death sentences for the offenses of armed robbery. Petitioner, TROY LEON GREGG, was sentenced to die on February 7, 1974, in the Gwinnett County Superior Court of Georgia, upon convictions for the murder and armed robberies of Fred Edward Simmons and Bob Durwood Moore.

On November 21, 1973, petitioner and a traveling companion by the name of Floyd Ralford ("Sam") Allen were hitchhiking north on the Florida Turnpike when they were picked up by Fred Edward Simmons and Bob Durwood ("Tex") Moore. Subsequently, the automobile in which the four men were traveling broke down. Simmons, the owner of the automobile, then summoned a Florida Highway Patrolman to drive Moore and himself to a local used car dealer, where Simmons purchased a 1960 red and white Pontiac. Simmons and Moore then reunited with petitioner and Allen and resumed their journey northward.

At the intersection of I-10 and I-75 in Florida, another hitchhiker, Dennis Weaver, was picked up. Weaver rode in the automobile until approximately 11:00 P.M., the night of November 21, where he was let out of the car at the intersection of I-85 and North Druid Hills Road in Atlanta. Petitioner drove while Weaver was in the car as both Moore and Simmons were both drinking heavily. Weaver testified at trial that no fighting words were exchanged by any of the men while he was present. T. 126.

The four men continued traveling in a northerly direction on I-85 to its intersection with Georgia Highway 20 in Gwinnett County, where the car was stopped so as to allow Simmons and Moore the opportunity to relieve themselves. The bodies of Simmons and Moore were found near this intersection the following morning. Each victim's death was determined to have been caused by gunshot wounds, a medical examiner for the State testifying that Simmons had been shot in the right corner of the right eye in the region of the temple (T.97) and Moore had been shot once in the right cheek of the face and once in the rear of his head. T. 92.

After reading about the alleged murders in an Atlanta paper on November 23, Weaver contacted the Gwinnett County Police Department, told them about his travels with the victims, gave descriptions of petitioner and Allen and the make and color of the automobile, and indicated that he thought the projected destination was Asheville, North Carolina. Based on this information, Gwinnett County Police broadcast a wanted description for the car and suspects over the National Crime Information Center teletype. That message led to the subsequent arrest of petitioner and Allen in Asheville on November 24. At the time of arrest, petitioner was driving a 1960 red and white Pontiac, which car was subsequently determined to be the one that Simmons had previously purchased.

Petitioner was placed under arrest on the ground that he was "wanted for investigation in Gwinnett County, possibly on a murder case." T. 165. No criminal charges were filed against petitioner at this time. A "shake down" search was then conducted, and a weapon later identified as the murder weapon was recovered, along with approximately $107.00 in cash, from the person of petitioner. A subsequent search of the car produced a bill of sale of the car to Simmons and some old clothes, and a search of the motel room where petitioner was staying turned up a stereo tape outfit and a car stereo player.

When the car was stopped at 3:00 P.M., petitioner was given the Miranda warning, and he thereafter signed a written waiver of his rights at 3:17 P.M. T.516. Petitioner was held at the police headquarters in Asheville from this time to approximately 9:30 P.M., at which time he was turned over to the Gwinnett County Police. From the time petitioner was placed under arrest to the time the Gwinnett Police arrived in Asheville, no interrogation of petitioner took place. T. 180. At the prompting of Gwinnett County authorities, petitioner made a statement at approximately 11:00 P.M. that was reduced to writing and signed by him. The statement was exculpatory in nature; although petitioner admitted shooting Simmons and Moore, he claimed to have done the shooting in self-defense. T. 282.

In this statement, petitioner further admitted taking four to five hundred dollars from the bodies after the shooting. T. 283. The Miranda warnings were not repeated to petitioner before he made this statement; in fact, they were never given to petitioner after being initially administered to him upon his arrest.

After making his statement, petitioner then returned to the lobby of the police station where he allegedly made the incriminating statement, "By God, I wanted them dead" in response to a question from Asheville Detective William Gibson as to "why he shot those people." T. 379. This statement was introduced at trial in rebuttal to petitioner's trial testimony that he had not meant to kill Moore and Simmons.

At approximately 1:00 A.M. the morning of November 25, petitioner was released to the custody of the Gwinnett County Police and was transported by automobile back to Lawrenceville, Georgia. Petitioner was handcuffed during the return trip, which lasted about four hours. T. 284. In the automobile with petitioner during the return trip were the District Attorney of Gwinnett County, who was in the back seat with petitioner, Detective Blannott and Lt. Morris, both of the Gwinnett County Police Department. T. 284. Following this car was the 1960 Pontiac, in which Sam Allen, along with Police Chief Crunkleton and Sergeant Mills of the Gwinnett County Police Department, James Burton of the District Attorney's Office of Gwinnett County, and Major Lawler of the Asheville Police Department rode. T. 285.

On returning to Georgia, the two cars went to the intersection of Georgia 20 and I-85 and stopped. The time was approximately 5:00 A.M., and the cars were stopped at the scene of the crime for the express purpose of reconstructing events. T. 290. Everyone got out, and Allen, (who was subsequently allowed to enter a plea, received a life sentence and did not testify against petitioner at trial) in the presence of petitioner and in response to a question from Detective Blannott, accused petitioner of shooting the victims without provocation and for the sole purpose of robbing them. Detective Blannott testified as to this statement at trial. T. 287. At the prompting of Chief Crunkleton, petitioner allegedly made a confession of the crimes at the scene (T. 287,288), although petitioner subsequently refused to sign a writing that set forth this alleged confession. T. 288.

Petitioner was tried simultaneously for the murders and armed robberies of Moore and Simmons. Petitioner testified under oath in his own defense, the testimony being similar to his earlier signed statement. T. 320, 321. At the conclusion of the evidence, the trial court charged the jury that it could find him either guilty or not guilty of the two charges of murder, and of the two charges of armed robbery. The jury found petitioner guilty of all four charges.

A sentencing hearing was then held, at which neither the State nor petitioner introduced any evidence. The trial court charged the jury that it could decide to recommend a death sentence for murder if it found:

> "One - That the offense of murder was committed while the offender was engaged in the commission of two other capitol felonies, to wit, the armed robbery of Fred Edward Simmons and Bob Durwood Moore.
>
> Two - That the offender committed the offense of murder for the purpose of receiving money and the automobile described in the indictment.
>
> Three - The offense of murder was outrageously and wantonly vile, horrible and inhuman, in that they involved the depravity of the mind of the defendant." T. 478, 479.

The jury was further instructed that it could decide to recommend a death sentence for armed robbery if it found:

> "That the offense of armed robbery was committed while the offender was engaged in the commission of two capitol felonies, to wit, the murders of Fred Edward Simmons and Bob Durwood Moore or that the offender committed the offense of armed robbery for the purpose of receiving money and the automobile set forth in the indictment, or three, that the offense of armed robbery was outrageously and wantonly

"vile, horrible and inhuman in that they involved the depravity of the mind of the defendant." T. 479

The jury recommended death on each of the four counts. The "aggravating circumstances" found by the jury to justify its death verdict for the two counts of murder were:

> "One - offense of murder was committed while the offender was engaged in the commission of two other capitol felonies, to wit: the armed robbery of Fred Edward Simmons and Bob Durwood Moore. Two, the offender committed the offense of murder for the purpose of receiving money and the automobile described in....[the two indictments]." T. 483,484.

The "aggravating circumstances" found by the jury to justify its death verdict for the two counts of armed robbery were:

> "One - the offense of armed robbery was committed while the offender was engaged in the commission of two capitol felonies, to wit; the murders of Fred Edward Simmons and Bob Durwood Moore. Two - the offender committed the offense of armed robbery for the purpose of receiving money and the automobile set forth in...[the two indictments]" T. 484,485.

The trial court thereupon sentenced petitioner to die.

On October 17, 1974, the Georgia Supreme Court affirmed petitioner's convictions and the two death sentences for the offenses of murder while setting aside and remanding for resentencing petitioner's two death sentences for the offenses of armed robbery. One Justice concurred specially, while one Justice dissented on the ground that the Georgia capitol punishment statute was unconstitutional. The Court denied rehearing on October 29, 1974, with one Justice dissenting.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. A timely motion to suppress evidence arising out of or subsequent to the arrest of petitioner was overruled by the trial court. In the Supreme Court of Georgia, petitioner's Enumeration of Error No. 5 asserted as error the act of the trial court, "In overruling the Motion to Suppress any and all evidence arising out of or subsequent to the arrest of the Defendant." This issue was briefed and rejected by a majority of the Supreme Court of Georgia. Gregg vs State, 233 Ga., at 123 (1974) (App. A, infra, at 7a). Petitioner again raised this issue in his petition for rehearing, but this petition was denied.

2,3. Timely objections were made to allowing the witness Blannott to testify as to conversations with and the statement of the petitioner and in allowing the statements and alleged confession of petitioner to be admitted into evidence, which objections were overruled by the trial court after a Jackson vs Denno hearing. In the Supreme Court of Georgia, petitioner's Enumeration of Error No. 6 asserted as error the act of the trial court, "In overruling the objections to and allowing the witness Blannott to testify as to conversations with and the statement of the Defendant." Further, Enumeration of Error No. 7 asserted as error the act of the trial court, "In allowing the statements of and the alleged confession of the Defendant to be admitted into evidence, over objection." These issues were briefed and rejected by a majority of the Supreme Court of Georgia. As to petitioner's contentions that his earlier waiver of rights after being given the Miranda warnings did not apply to his subsequent statements, the Court below held: ". . . we cannot agree with his claim that the Miranda warnings had gone stale." Gregg vs State, 233 Ga., at 125 (1974) (App. A, infra, at 9a). The Court below further held:

> "Moreover, considering the totality of the circumstances, the record supports the determinations by the judge and the jury in the Jackson vs Denno hearing that the statements were voluntarily made." Id.

Petitioner again raised these issues in his petition for rehearing, but this

petition was denied.

4,5. In the Supreme Court of Georgia, petitioner's Enumeration of Error No. 3 asserted that:

> "The lower Court erred in submitting to the jury the issue of punishment by death in that punishment by death constitutes cruel and inhumane punishment contrary to the provisions of the Eighth and Fourteenth Amendments to the Constitution of the United States."

This issue was briefed and rejected by a majority of the Supreme Court of Georgia on the ground that the Court had previously upheld the constitutionality of the Georgia death statute, citing, inter alia, Colley vs State, 231 Ga. 829 (1) (1974). Gregg vs State, 233 Ga., at 125, 126 (1974) (App. A, infra, at 9a, 10a). Petitioner again raised this issue in his petition for rehearing, but this petition was denied.

REASONS FOR GRANTING THE WRIT

1. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER PROBABLE CAUSE FOR A SUBSEQUENT WARRANTLESS ARREST MAY BE SATISFIED THROUGH INFORMATION RECEIVED FROM AN INFORMANT WHO HAD NOT SEEN THE COMMISSION OF THE CRIMES FOR WHICH THE ARREST WAS MADE OR ANY PREVIOUS CRIMINAL OR INCRIMINATING CONDUCT ON THE PART OF THE PERSON ARRESTED, AND WHO HAD NEVER BEEN AN INFORMANT IN THE PAST.

The Fourth Amendment to the Constitution of the United States provides in material part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause..."

Although the Fourth Amendment does not specifically require a finding of probable cause for warrantless searches and seizures, the requirements in these cases"... surely cannot be less stringent than where a...warrant is obtained." Wong Sun v. United States, 371 U.S. 471,479 (1963). Consequently, probable cause is also required for searches and seizures made without a warrant. Id.; Draper v. United States, 358 U.S. 307 (1959). The Fourth Amendment protection against unreasonable searches and seizures, the correlative requirement of probable cause, and the right to have excluded from criminal trials any evidence obtained in violation of the Amendment's guarantees are applicable to state prosecutions. Mapp v. Ohio, 367 U.S. 643 (1961).

An illegal arrest, or one made without probable cause, is an unreasonable seizure and is a violation of the Fourth Amendment. Terry v. Ohio, 392 U.S. 1 (1968). Probable cause for arrest requires facts and circumstances within the arresting officers' knowledge or of which he has reasonably trustworthy information which are sufficient to warrant a man of reasonable caution in believing that a crime had been committed and that the person to be arrested had committed it.

Carroll v. United States, 267 U.S. 132 (1925); Draper v. United States, 358 U.S. 307 (1959). Where, as here, probable cause to arrest is based upon information received from an informant, this "tip" must be accompanied by (1) "some of the underlying circumstances on which the informant based his conclusions", and (2) some basis to support the conclusion either that the informer was "credible" or his information "reliable". Aguilar v. Texas, 378 U.S. 108, 114 (1964). These two elements must both be established through testimony at the suppression hearing in cases where the arrest was made without a warrant. Beck v. Ohio, 379 U.S. 89 (1964).

Petitioner was arrested in Asheville, North Carolina upon a "wanted" bulletin issued by Gwinnett County Police and transmitted over the National Crime Information Center teletype. Since the Asheville police had no more probable cause to arrest than did the authority transmitting the bulletin, Whitely v. Warden, 401 U.S. 560 (1971), the information upon which the wanted bulletin was based must be examined to determine whether probable cause existed to arrest petitioner.

This bulletin was based upon information received from Dennis Weaver, a hitchhiker who had ridden in the car containing the victims and petitioner just prior to the occurrence of the alleged murders. After reading about the murders in an Atlanta newspaper on November 23, Weaver contacted the Gwinnett County Police Department and told Detective B. H. Blannott what he knew about the circumstances surrounding the deaths. He described in some detail the automobile in which he rod, knew the first names of the victims, indicated that the projected destination was Asheville, and gave physical descriptions of petitioner and his companion Sam Allen. T. 230. Weaver further made a drawing of petitioner in an attempt to more accurately describe his appearance. T. 231. This information comprised the bulletin that eventually led to petitioner's arrest. T. 239.

Since the determination of probable cause is based herein upon information as to which the person who must have probable cause (i.e., Detective Blannott) does not have direct knowledge, the two-pronged Aguilar requirement applies. See Note, "The Informer's Tip as Probable Cause for Search or Arrest," 54 Cornell L. Rev. 958 (1969). Was Weaver's tip accompanied by (1) underlying circumstances on which he based his conclusions, and (2) underlying circumstances indicating that he was credible or his information reliable? Weaver was not an eye-witness to the commission of the crimes, nor had he been a witness to any previous criminal or incriminating conduct on the part of petitioner. He was aware of no animosity on the part of petitioner toward the victims. Further, the Gwinnett County police had never relied upon information received from Weaver in the past in the conduct of investigations.

Although it is arguable that the tip was sufficiently detailed so as to indicate the underlying circumstances on which Weaver based his conclusions, yet the tip does not disclose why Weaver was believed to be a credible person. There is no indication that Weaver had provided information on past occasions which upon investigation proved to be correct, as in McCray v. Illinois, 386 U.S. 300 (1967) and Draper v. United States, 358 U.S. 307 (1959). The details of the tip related only to the description of petitioner and his companion and the automobile, matters purely collateral to the real issues of murder and armed robbery. The tip did not specify that petitioner was armed; in fact there is no indication that Weaver at any time saw the gun that was found on petitioner at the time of his arrest and that was subsequently identified as the murder weapon. Consequently, the detail of the tip provides no basis for inferring that the informant obtained his information in a reliable way. Thus, the tip itself is not sufficient to constitute probable cause because of the lack of the second element required under the Aguilar test.

Where the tip itself is deficient, other information may be considered in determining whether there is probable cause. "If the tip is found inadequate under Aguilar, the other allegations which corroborate the information contained in the hearsay report should then be considered..." Spinelli v. United States, 393 U.S. 410,415 (1969). However, this Court has stated:

> "Of course, the discoveries of an illegal search cannot be used to validate the probable cause judgment upon which the legality of the search depends." Whiteley v. Warden, 401 U.S. 560,564 (1971).

This indicates that corroboration of the deficient tip is limited to information and observations occurring prior to arrest: the "fruits" of the arrest cannot be used as an after-the-fact justification for an arrest that was not based upon probable cause at the time it was made. Since the tip went to details collateral to the crimes allegedly committed, as previously mentioned, any corroboration of the tip necessarily went to collateral details. Thus, the substance of tip, i.e. that petitioner committed the crimes for which he was arrested, was not rendered more reliable by any corroboration that may have existed, and the tip consequently was not cured of its deficiency.

This Court's decision in United States v. Harris, 403 U.S. 573 (1971), does not call for a different result. In Harris, this Court held that evidence of an informant's prior credibility was not necessary in order to establish probable cause for the issuance of a search warrant. Although there was no corroboration of the informant's tip in Harris, the tip was found credible on the following grounds: (1) The report recounts the informer's alleged recent observations of criminal activity and contains a rather detailed description of the premises on which the criminal activity was occurring; (2) The investigator's affidavit asserts Harris' reputation as a bootlegger and the investigator's personal knowledge that liquor had been previously found in an abandoned house under "Harris' control"; and (3) The informer was, by supplying the information, admitting his own participation in a crime. Because this Court gave its decision in a three-part opinion, the division of the justices so that no part of the opinion had the support of a majority renders a determination of the precise holding of the Court fruitless. For this reason, Harris should be limited to its own specific fact situation. Obviously, the situation herein presented does not fall within the scope of Harris, for none of the three factors that lent credibility to the tip in Harris is present.

It is submitted for the above reasons that the information supplied by Weaver, together with any corroborating facts, was not sufficient to constitute probable cause to arrest petitioner. (Even though a warrant for petitioner's arrest was subsequently obtained by Gwinnett County authorities, the arrest was made without a warrant, because no warrant was in existence at the time of arrest. However, the Aguilar test is applicable to both arrests with and without warrants under Aguilar and Beck, supra, so this distinction is inconsequential.) Since probable cause was lacking, the arrest of petitioner was an unreasonable seizure under the Fourth Amendment, and it was error for the trial court to admit any evidence obtained in violation thereof. Mapp v. Ohio, supra. Under the "fruit of the poisonous tree" rule applicable to the evidentiary fruits of unconstitutional arrests, Wong Sun v. United States, 371 U.S. 471 (1963), the weapon and the cash seized from petitioner's person upon his arrest, the stereo tape outfit and the car stereo player seized from petitioner's hotel room, and the subsequent incriminating statements made by Sam Allen and petitioner himslef, were inadmissible under the exclusionary rule espoused in Mapp. The erroneous admission of the above evidence necessarily had a tremendous "...impact on the minds of the...jury", so as to affect the "substantial rights" of petitioner. Harrington v. California, 395 U.S. 250,154 (1969). For this reason the concept of "harmless error" cannot be invoked herein, and the erroneous admission into evidence of the above items constituted reversible error in violation of petitioner's rights guaranteed by the Fourth and Fourteenth Amendments to the Constitution of the United States.

II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER A WAIVER OF RIGHTS EXECUTED AFTER THE ADMINISTRATION OF THE MIRANDA WARNINGS AND AT THE TIME OF ARREST APPLIES TO CUSTODIAL INTERROGATION SESSIONS HELD A MATTER OF HOURS AFTER ARREST, WHERE THE PERSON EXECUTING THE WAIVER WAS NEITHER INTERROGATED AT THE TIME HE WAS WARNED NOR INTERROGATED IN THE SUBSEQUENT SESSIONS BY THE SAME OFFICERS WHO HAD ADMINISTERED THE MIRANDA WARNINGS TO HIM.

The Fifth Amendment to the Constitution of the United States provides that no person "...shall be compelled in any criminal case to be a witness against himself...". In Miranda v. Arizona, 384 U.S. 436 (1966), in holding that the privelege against self-incrimination is applicable during a period of custodial interrogation, this Court supplemented the traditional due process requirement that a confession must be voluntarily made in order to be admissible in a criminal prosecution with specific rules aimed at safeguarding this privilege. After custodial interrogation "contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely," Id., at 467, this Court established guidelines relating to the right to remain silent and to counsel in police interrogations, whether state or federal.

These guidelines, which have come to be known as the "Miranda Warnings", require that the accused prior to any custodial interrogation be warned:

> "...that he has the right to remain silent, that anything he says can be used against him in a Court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he desires...". Id., at 478.

Although this Court recognized that these rights could be waived, it stated a strict policy in regard to waivers:

> "If the interrogation continues without the presence of an attorney, and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel..." Id., at 475 (emphasis added).

Petitioner was arrested at approximately 3:00 P.M on November 23, 1973. He was immediately given the Miranda Warnings by the arresting officer and he thereafter signed a written waiver of his rights at 3:17 P.M. Petitioner was not interrogated at that time nor at any time subsequent thereto by the arresting officer. T. 180. Instead, he was held at the police headquarters in Asheville pending the arrival of Gwinnett County authorities, who arrived in Asheville at approximately 9:30 P.M. Petitioner was then turned over to the Gwinnett authorities, and upon their prompting made a statement that was reduced to writing and signed by him at approximately 11:30 P.M. T. 283. In this statement, petitioner alleged that he shot the victims in self-defense, and further admitted taking four to five hundred dollars from the bodies after the shooting. T. 282,283. The Miranda Warnings were not repeated to petitioner before he made this statement; in fact the warnings were never given to petitioner after they were initially administered to him upon his arrest. T. 297.

After making his statement, petitioner then returned to the lobby of the Asheville police station where he allegedly made the incriminating statement, "By God, I wanted them dead", in response to a question from Asheville Detective William Gibson as to "why he shot those people." T. 379. At approximately 5:00 A.M. on November 24, a full fourteen hours after petitioner was arrested and given his Miranda Warnings, petitioner is alleged to have confessed to the commission of the crimes. T. 288.

Each of the above three statements of petitioner was the product of "custodial interrogation", because each statement resulted from "...questioning initiated by law enforcement officers after...[petitioner was]...taken into custody or otherwise deprived of his freedom of action in any significant way." Id., at 444.

It is immaterial whether these statements met the technical requirements of a confession:

> "No distinction can be drawn between statements which are direct confessions and statements which amount to 'admissions' of part or all of an offense. This privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination." Id., at 476.

The issue herein presented thus resolves itself into the question of whether the written waiver of rights executed after the administration of the Miranda Warnings and at the time of petitioner's arrest applies to petitioner's later statements so as to satisfy the "heavy burden" placed upon the State to demonstrate a knowing and intelligent waiver by petitioner of his privilege against self-incrimination?

In Miranda, this Court made the following statements:

(1) "...a warning at the time of the interrogation is indispensible to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time." Id., at 469 (emphasis added).

(2) "Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked." Id., at 474.

(3) "Opportunity to exercise these rights must be afforded to him throughout the interrogation." Id., at 479.

The above statements indicate this Court's strong concern that the accused be given a continuing right to invoke the privilege against self-incrimination while subject to custodial interrogation, and that the accused be apprised of this right prior to his being subjected to the coercive pressures engendered by custodial interrogation.

Petitioner was given the Miranda Warnings by the arresting officer, and immediately thereafter executed a waiver of rights. Yet he was not subjected to interrogation for a period in excess of eight hours after his arrest. Further, when he was initially subjected to interrogation, the interrogators were not the arresting officers, but were Gwinnett County authorities. Finally, petitioner's alleged confession was made a full fourteen hours after his arrest, and was made under the most coercive of circumstances (i.e., at the scene of the crime, at 5:00 A.M., in the presence of a horde of law enforcement officials, and in response to an accomplice's accusation that petitioner was the sole perpetrator of the crimes). If the purpose of the warning is to "...show the individual that his interrogators are prepared to recognize is privilege should he choose to exercise it", Id., at 468, then clearly under the circumstances herein presented, the earlier written waiver cannot be held to satisfy the "heavy burden" placed upon the State to demonstrate a knowing and intelligent waiver by petitioner prior to his being subjected to interrogation. Because of the substantial time interval between the execution of the waiver and the commencement of interrogation, together with the circumstances surrounding the subsequent interrogation sessions, a contrary holding would thwart and render nugatory the salutory purpose behind the privilege against self-incrimination, as espoused by this Court. In terms of the Fifth Amendment then, petitioner's three statements must be considered to have been involuntarily made.

This Court in Miranda further stated:

> "But unless and until such warnings and waivers are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him." Id., at 479.

Thus, it was error for the trial court to admit into evidence the three incriminating statements made by petitioner, since it was not shown that petitioner effectively waived his Miranda rights. In Chapman v. California, 386 U.S. 18,23 (1967), this Court stated that the right to keep an involuntary confession out of evidence may be "so basic to a fair trial" that its violation could never be harmless error.

Chapman arguably stands for the principle that the admission of an involuntary confession requires automatic reversal; however, in light of the gravity and number of the involuntary incriminatory statements that were admitted into evidence, harmless error cannot be invoked herein under any reading of Chapman. For this reason, the erroneous admission into evidence of the three involuntary statements made by petitioner constituted reversible error and a violation of petitioner's constitutional privilege against self-incrimination.

III. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE TOTALITY OF THE CIRCUMSTANCES UNDER WHICH A CONFESSION MADE BY PETITIONER WAS OBTAINED RENDERED THE CONFESSION INVOLUNTARY IN VIOLATION OF THE DUE PROCESS OF LAW GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES.

In order for a confession to be admissible in a criminal prosecution, it is a requirement of due process of law that the confession be voluntarily made. This requirement of voluntariness is binding on the states under the Due Process Clause of the Fourteenth Amendment. Brown v. Mississippi, 297 U.S. 278 (1936). The requirement of voluntariness being based on the due process clause, is separate and independent from the specific rules governing the admissibility of confessions enunciated in Miranda, supra, which was based upon the Fifth Amendment privelege against self-incrimination. One of the goals sought to be achieved by the due process voluntariness requirement is to ensure the testimonial trustworthiness or reliability of a confession that is sought to be introduced into evidence. Brown v. Mississippi, supra. Mental, as well as physical, compulsion may render a confession unreliable and thus involuntary. Chambers v. Florida, U.S. 227 (1940). Another goal sought to be achieved by the voluntariness requirement is to deter offensive and improper police practices, even where reliability of the confession is not in issue. Rogers v. Richmond, 365 U.S. 534 (1961).

The voluntariness test requires an examination of the "totality of the circumstances" surrounding a confession. Haynes v. Washington, 373 U.S. 503 (1963). Petitioner is alleged to have confessed to the crimes of murder and armed robbery at the scene of the crime. Yet the circumstances surrounding the confession present the question of whether the confession was a product of petitioner's "rational intellect and...free will", Blackburn v. Alabama, 361 U.S. 199 (1960) or whether it was involuntary.

Petitioner was arrested in Asheville, North Carolina on November 23, 1973 at 3:00 P.M. for a crime allegedly committed in Gwinnett County, Georgia.

At 5:00 A.M. the morning of November 24, and after fourteen hours of detention during which no one other than the police had spoken to petitioner, the confession was allegedly made. The confession occurred after petitioner was taken upon returning to Georgia, to the scene of the crime for the express purpose of reconstructing events. T. 290. Those present at the scene of the crime included seven law enforcement officials and petitioner's accomplice, Sam Allen. T. 284, 285. Petitioner was handcuffed at the time. Allen, in the presence of petitioner and in response to a question from Detective Blannott, attempted to exculpate himself by accusing petitioner of shooting and robbing the victims. T. 287. Detective Blannott testified at trial that, upon being asked by Chief Crunkleton if Sam's account was correct, petitioner replied, "Yes, it was." T. 287. To Crunkleton's subsequent question as to whether petitioner "...shot these men down in cold-blooded murder just to rob them", petitioner allegedly replied, "Yes." T. 288. Petitioner was not given the Miranda warnings at the scene of the crime; instead, reliance was placed upon a written waiver executed at the time of petitioner's arrest fourteen hours earlier. Petitioner denied making this confession, instead testifying that he answered the question by stating, "Same was doing the talking." T. 350. Petitioner subsequently refused to sign a writing that set forth the alleged confession. T. 288.

It is submitted that the "totality of the circumstances" set forth above renders the confession inherently unreliable and evidences a total disregard by the law enforcement authorities involved of proper police practices, thus thwarting both of the aforementioned goals sought to be served by the voluntariness test. Since either factor is sufficient to render the confession involuntary under the decisions of this Court, the concurrence of both factors a fortiori renders petitioner's confession involuntary and inadmissible at trial. For the reasons set forth in Part II of this petition, supra, the introduction of petitioner's confession into evidence cannot be considered to be harmless error. Therefore, the erroneous admission into evidence of the confession constituted reversible error and a violation of petitioner's rights to the Due Process of the Law guaranteed by the Constitution of the United States.

IV. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF GEORGIA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

A. The Perpetuation of Arbitrary Selectivity Under the New Georgia Capital Punishment Statute[1]

On June 29, 1972, this Court invalidated the capital punishment laws of the State of Georgia and held that the death penalty could no longer be imposed under a statutory scheme which permitted its arbitrary, rare and discriminatory use. Furman v Georgia, 408, U. S. 238 (1972). In the wake of Furman,, the Georgia legislature modified its death penalty statutes, and it is under the modified statues that petitioner has been condemned to die. The question presented here is whether the modifications wrought by the Georgia legislature are substantial enough to meet the minimum requirement of Furman v. Georgia - - that the most extreme penalty known to contemporary man not be imposed arbitrarily.

Once this Court has determined the existence of unconstitutional practices, it has heretofore invalidated subsequent contrivances and evasions which seek to perpetuate such practices in new guises. Cf. Guinn v United States, 238 U. S. 347, (1915) with Lane v Wilson, 307 U. S. 268 (1939). The Constitution "nullifies sophisticated as well as simple-minded modes of discrimination." Lane v Wilson, supra, at 275. As will be demonstrated infra, death sentences are still "wantonly and . . . freakishly imposed," Furman v. Georgia, supra, at 310 (Mr. Justice Stewart, concurring) in Georgia, and the statutory modifications of 1973 provide "no meaningful basis for distinquishing the few cases in which . . . [the death

[1]Part IV-A, Introduction herein is adapted from Part I-A of the Petition for Certiorari, Eberheart vs Georgia, No. 74-5174 (filed August 19, 1974.)

penalty] is imposed from the many cases in which it is not." Id., at 313 (Mr. Justice White, concurring.)

The new Georgia law provided a bifurcated trial for the administration of the death penalty for inter alia, murder and armed robbery. See generally Coley v. State, 231, Ga. 829 (1974). After the jury or judge returns a verdict or finding of guilty or after a plea of guilty to one of these crimes, a sentencing hearing is conducted before the jury or judge, and at this hearing, "the jury or judge shall hear additional evidence in extenuation, mitigation and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of such prior convictions and pleas." Ga. Laws 1973, p. 162, Act No. 74.[2] The State may present only such evidence in aggravation as it has made known to the Defendant.

The judge is to consider or to include in his instructions to the jury "any mitigating circumstances or aggravating circumstances otherwise authorized by law and . . . statutory aggravating circumstances which may be supported by the evidence." Ga. Code Ann. §27-2534.1 (b). The "statutory aggravating circumstances" for which the death penalty may be imposed in murder and armed robbery cases are:

> " (1) The offense of murder . . . [or] armed robbery . . . was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who had a substantial history of serious assaultive criminal convictions.
>
> (2) The offense of murder . . . [or[armed robbery . . . was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.
>
> "(3) The offender by his act of murder [or] armed robbery . . . knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.
>
> (4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.
>
> (5) The murder of a judicial officer, former judicial officer, district attorney, or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.
>
> (6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.
>
> (7) The offense of murder . . . [or armed robbery] . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.
>
> (8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.
>
> (9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.
>
> (10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another."

Ibid. What, if any, additional "aggravating circumstances" are "otherwise authorized by law" is obscure. "Mitigating circumstances " are not defined or enumerated at all.

[2] This section was modified in certain minor respects by Ga. Laws, 1974, p. 355 - 358, Act No. 854, which also provided that the section would be designated Ga. Code Ann. §27-2503.

The jury may - but need not - impose a death sentence in all capital cases dher than those of homicide when it finds beyond a reasonable doubt a "statutory aggravating circumstances." For to condemn a defendant, it must also make a "recommendation of death." [3]Ga. Code Ann. §27-2534.1 (c). See Ga. Code Ann. §26-3102.

Provision is made for the filing of a standardized form of "report" by the trial judge in capital cases where the death penalty is imposed and for direct automatic appeal to the Georgia Supreme Court. General guidelines for review are provided, [4]and the Georgia Supreme Court is empowered to affirm the death sentence or to set it aside and remand the case for resentencing. Ibid.

[3]At the time of petitioner's trial, Ga. Code Ann. § 27-2303 provided:

> "In all capital cases, other than those of homicide, when the verdict is guilty, with a recommendation to mercy, it shall be legal and shall mean imprisonment for life."

[4]The Court is directed to consider "the punishment as well as any errors enumerated by way of appeal" in a case where a death sentence has been imposed and to determine:

> "(1) Whether the sentence of death was imposed under the influence of passon, prejudice, or any other arbitrary factor, and
>
> (2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Code section 27-2534.1 (b), and
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

Ga. Code Ann. §27-2537 (c). If the court affirms a death sentence, it "shall include in its decision a reference to those similar cases which it took into consideration." Ga. Code Ann. §27-2537 (e).

Executive discretion to grant or deny clemency in cases where a death sentence has been imposed remains unregulated.

The discrepancy between the regularity and even-handedness constitutionally required in capital sentencing and the unpredictable arbitrariness which results from the modified Georgia procedures can only be appreciated after analysis of the various selective mechanics which operate before, during, and after sentencing of defendants charged with crimes potentially punishable by death. For the imposition of a death sentence in Georgia remains an extraordinarily rare and fortuitous event not only because judges and juries so often seize the opportunity for mercy offered in sentencing discretion, but also because a death sentence signifies that a defendant has missed each of the many opportunities for a lesser disposition.

In order to avoid burdening this Court with repetitive matter, petitioner herein adopts and incorporates the argument stated in Part I-A (1) - (3) of the Petition for Certiorari, Eberheart vs Georgia, No. 74-5174 (filed August 19, 1974) at pp. 25-46(attached hereto as Appendix B). For the reasons stated in Part I-D of the Petition for Certiorari, Dillard v North Carolina, No. 73-6875 (filed June 11, 1974) at pp. 45-51 (attached hereto as Appendix C), petitioner urges this Court to consider whether the penalty of death violates "the evolving standards of decency that mark the progress of a maturing society." Trop v Dulles, 356 U. S. 86, 100 (1958) (plurality opinion of Chief Justice Warren).

V. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE PROVISIONS FOR APPELLATE REVIEW OF DEATH SENTENCES ESTABLISHED BY THE NEW GEORGIA CAPITAL PUNISHMENT STATUTE, GEORGIA LAWS 1973, PP. 159-172, ACT NO. 74, VIOLATE THE RIGHTS OF AN INDIGENT DEFENDANT TO THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND TO THE DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES?

To avoid burdening this Court with repetitive matter, petitioner adopts and incorporates the argument set forth in Part II of the Petition for Certiorari, Eberheart v. Georgia, No. 74-5174 (filed August 19, 1974) at pp. 49-58 (attached hereto as Appendix D).

CONCLUSION

Petitioner prays that the petition for a writ of certiorari be granted.

Respectfully submitted

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APPENDIX A

Opinion of the Court below.

28996. GREGG v. THE STATE.

1. There was ample evidence to support the verdict finding the appellant guilty of the multiple offenses of murder and armed robbery.

2. Since voluntary manslaughter was not involved here, it was not error to fail to charge thereon.

3. The trial court did not err in overruling the motion for directed verdicts as to the armed robberies.

4. There was probable cause for the arrest of the appellant and his subsequent statements were voluntary.

5. Imposition of the death penalty pursuant to Code Ann. § 27-2534.1 (Ga. L. 1973, p. 159) does not constitute cruel and unusual punishment in violation of the Constitution of the United States.

6. There was no error in the imposition of two death sentences for the offenses of murder upon the appellant in this case since all the statutory standards were met; however, the two death penalties for the armed robbery offenses cannot be sustained under the statutory standards.

ARGUED JULY 9, 1974 — DECIDED OCTOBER 17, 1974 — REHEARING DENIED OCTOBER 29, 1974

Murder. Gwinnett Superior Court. Before Judge Merritt.

Harrison & Garner, G. Hughel Harrison, for appellant.

Bryant Huff, District Attorney, Arthur K. Bolton, Attorney General, John B. Ballard, Jr., Deputy Assistant Attorney General, for appellee.

GRICE, Chief Justice.

Troy Leon Gregg was tried and convicted in the Superior Court of Gwinnett County for the murders and armed robberies of Fred Edward Simmons and Bob Durwood ("Tex") Moore. The case is before this court on appeal and mandatory review of the death sentences imposed on each of the four counts charging these crimes.

In substance, the issues involve (1) overruling the

motion for new trial; (2) failing to charge on voluntary manslaughter; (3) overruling a motion for acquittal; (4) allowance of evidence arising from arrest, conversations and statements of the appellant; (5) invalidity of the statute providing for capital punishment; and (6) illegal imposition of such punishment.

1. The first enumeration of error contends that the trial court erred in overruling the appellant's amended motion for new trial. The allegations of that motion are incorporated in the other enumerations of error except for the one based upon the general grounds. Although not argued by the appellant and thus normally deemed to be abandoned, we have nevertheless reviewed the transcript of evidence upon those grounds because of the capital punishment imposed.

The evidence which the state presented to prove guilt is that which follows.

On Wednesday morning, November 21, 1973, the appellant Gregg (age 25) and a traveling companion Floyd Ralford ("Sam") Allen (age 16) were hitchhiking north in Florida. They had only $8 between them when they were given a ride by the above named victims. About two hundred forty miles north of Miami on the Florida Turnpike, their automobile broke down. A Florida State Highway Patrolman accompanied Simmons and Moore to an automobile dealer where Simmons purchased a 1960 red and white Pontiac. Thereafter, they again picked up Gregg and Allen and resumed their journey northward. Enroute, both Simmons and Moore were seen in possession of large sums of money.

At the intersection of I-10 and I-75 in north Florida, another hitchhiker, Dennis Weaver, was picked up. He rode with the group until he got out at the intersection of I-85 and Highway 23 (North Druid Hills Road) in Atlanta, Georgia, at approximately 11:00 p.m. that evening. Gregg drove during the time Weaver was in the car while Simmons and Moore did considerable drinking. No fighting words were exchanged by any of the men while he was present.

Allen stated to a police detective in the appellant's presence as follows: that at the intersection of Georgia Highway 20 and I-85 in Gwinnett County, Georgia, they

stopped for a rest stop and Simmons and Moore got out; that Gregg turned around and told Allen to get out, "we're going to rob them"; that Gregg lay up on the car with a gun in his hand to get good aim and as Simmons and Moore were coming back up the bank he fired three shots; that one of the men fell and the other staggered; that Gregg then circled around the back of the car and approached the two men, both of whom were then lying in a drainage ditch; that Gregg placed the gun to one's head and pulled the trigger, then went quickly to the other one and placed the gun at his head and pulled the trigger again; that he took their money and whatever contents were in their pockets; and that he then told Allen to get in the car and they drove away.

The bodies of Simmons and Moore were found in the drainage ditch. A State Crime Laboratory medical examiner stated that death was caused by gunshot wounds, that Simmons had been shot in the right corner of the right eye in the region of the temple and Moore had been shot once in the right cheek of the face and once in the rear of his head.

On Friday morning, November 23, 1973, the hitchhiker, Dennis Weaver, went to an Atlanta restaurant for breakfast. While there he noticed an article on the front page of an Atlanta newspaper that led him to call the Gwinnett County Police Department. He told them he thought Gregg and Allen were going to Asheville, North Carolina. In response to a bulletin from Gwinnett County authorities, the Asheville Police apprehended Gregg driving Simmons' 1960 Pontiac at about 3:00 p.m. November 24, 1973. With him in the car were Allen and three other persons. A .25-caliber automatic pistol was found in Gregg's pocket. He also had approximately $107 in cash. Ballistics tests subsequently established that bullets from the gun in Gregg's pocket caused the death of Simmons and Moore.

Weaver accompanied police officers to Asheville where he identified the automobile in which he had ridden with Gregg and the two victims, and headbands worn by Gregg and Allen.

At the scene of the crimes, when confronted with a narration of the crimes by Allen, Gregg made no protest.

When asked if that was how it happened, he responded, "Yes, it was."

In rebuttal of defense evidence the state established that when asked by an Asheville detective why he did it, Gregg replied: "By God, I wanted them dead." Also, the state presented evidence that the appellant, while awaiting trial, wrote a letter to Allen, requesting that he testify as outlined in the letter, which accorded with the appellant's trial testimony.

The appellant testified that he and Allen were given a ride by Simmons and Moore; that throughout the trip Simmons and Moore were drinking beer or whiskey; that when they stopped at the intersection of Georgia 20 and I-85 "Fred hit me on the left jaw and knocked me in the drainage ditch and I got back up and asked him to leave me alone and he hit me the second time and knocked me back into the drainage ditch and when I come out of the drainage ditch the second time he came at me. I don't know what he had in his hand, it could have been a knife or pipe, I don't know what it was, but when he came at me the second time I shot him."

The appellant swore that he was very scared; that he left there because he was scared and drove the car up I-85 until they got to Howard Johnson's and stayed all night; that he did not mean to kill either one of the victims and shot them to protect himself; that he had over a hundred dollars on him by virtue of a cab driver he bumped into repaying money owed him; and that the new clothing and equipment in his possession when he was apprehended were either bought by Allen, found in the motel room, or already owned by him. He denied writing some of the words in the letter of instruction written to Allen while both were in jail.

We conclude that the verdict was not contrary to the evidence, that there was ample evidence to support it and that it was not contrary to law or the principles of justice and equity.

2. The second enumeration alleges that the trial court erred in failing to charge on voluntary manslaughter (Code Ann. § 26-1102; Ga. L. 1968, pp. 1249, 1276).

In *Williams v. State*, 232 Ga. 203, 204 (206 SE2d 37),

this court held that there must be at least some evidence to support a charge of voluntary manslaughter before it is required; and that "The evidentiary circumstances necessary to show voluntary manslaughter, as opposed to circumstances showing the homicide was justified, relate to a situation which arouses sudden passion in the person killing so that, rather than defending himself, he wilfully kills the attacker, albeit without malice aforethought, when it was not necessary for him to do so in order to protect himself. The distinguishing characteristic between voluntary manslaughter and justifiable homicide in such cases is whether the accused was so influenced and excited that he reacted passionately or whether the defendant acted simply to defend himself."

Here, however, the state's evidence showed only murder and armed robbery. Also, the thrust of the appellant's testimony was that of self-defense. He disclaimed any intent to kill, stating that he shot Simmons because Simmons had pushed him into a ditch and was threatening him with a knife or pipe, and that he shot Moore because Moore was beating Allen.

In our view, the evidence failed to show any "sudden, violent and irresistible passion resulting from serious provocation" (Code Ann. § 26-1102, supra). Therefore, voluntary manslaughter was not in issue and the trial court did not err in refusing to instruct the jury as to that principle of law.

3. The fourth enumeration insists that the trial court erred in overruling the motion for directed verdict of acquittal of the appellant as to Counts 2 and 4 of the indictment (armed robbery of Simmons of the automobile and armed robbery of Moore of $400 in money), in that the evidence was insufficient to sustain the verdict and sentence.

We do not agree.

(a) Evidence of ownership and possession of the Pontiac automobile by Simmons was as follows.

The Florida Highway Trooper referred to above testified that when he stopped to investigate a 1960 Ford which broke down on the Florida Turnpike, Simmons told him it was his; that Simmons asked the trooper to drive

him to buy another car; that he purchased a 1960 red and white Pontiac at Johnson's Auto Sales in Winter Garden, Florida; that he saw Simmons receive a bill of sale which Simmons and the seller, Ralph Johnson, signed and he witnessed; that he saw Simmons leave in the 1960 Pontiac with the bill of sale; that Simmons paid $275 for the car; and that actual title was to be picked up on the return trip. This was the same automobile with the bill of sale in it which the appellant was driving at the time of his arrest in Asheville.

This court has previously held that "In an indictment for robbery, ownership of the property taken may be laid in the person having actual lawful possession of it . . ." *Spurlin v. State*, 222 Ga. 179 (7) (149 SE2d 315).

In our view, the evidence here indicates both possession and ownership in Simmons as alleged in the indictment as the victim of the robbery.

(b) The transcript reveals that money was obtained by the appellant from Moore as alleged in Count 4 of the indictment.

In this connection, the Florida highway trooper testified that Simmons and Moore had a considerable amount of money; that after paying for the Pontiac they still had a "wad" left over; that it looked like a considerable amount of money, consisting of cash, tens and twenties, and bills of various denominations; that the tall man (Moore) had most of the money in several pockets; and that he kept pulling money out of all different pockets.

Also, Detective Blannott stated that the appellant told him that "we took four or five hundred dollars off them and left in their car"; that in the presence of Allen and the investigating officers, the appellant admitted that Allen's recitation of the facts was correct wherein he stated that appellant took the money from the victims' pockets after he had shot them and they were lying in the ditch; that the appellant had in his possession on arrest $107 in cash; and that he was wearing new boots and there was some new clothing in the car.

It was also shown that the officers later found additional new clothing, a stereo tape outfit and a new stereo tape player for a car in the motel where the

appellant was staying.

We hold that the evidence was sufficient to justify the jury in finding that money was taken from Moore by the appellant, as alleged in Count 4 of the indictment.

For these reasons, Enumeration 4 cannot be sustained.

4. Enumerations 5, 6 and 7 allege error (a) in overruling the motions to suppress evidence arising out of or subsequent to the arrest of the appellant; and (b) in overruling the objections to and allowing the witness Blannott to testify as to conversations with and the statement of the appellant and in allowing the statements and alleged confession of the appellant to be admitted into evidence.

As we view the evidence, there was probable cause for the appellant's arrest; and his subsequent statements were voluntarily made with full awareness of his rights.

First, a review of the evidence available to the Gwinnett County police is pertinent to a determination of whether there was probable cause for their bulletin through the National Crime Information Center which culminated in the appellant's arrest in Asheville.

This evidence showed that the bodies of Moore and Simmons were found, apparently dead of gunshot wounds. Weaver described Simmons' red and white Pontiac in great detail as well as the two other hitchhikers, Allen and the appellant, who were with Moore and Simmons when Weaver got out of the car in Atlanta, a short time before the murders occurred north of Atlanta. The Gwinnett County authorities knew that Allen and the appellant, and the automobile, had already left the scene of the crime with the possibility of extended flight.

Clearly, from this evidence there was probable cause for a reasonably prudent person to believe that a crime had been committed by the appellant. United States v. Harris, 403 U. S. 573, 584 (91 SC 2075, 29 LE2d 723) (1971); *Hood v. State*, 229 Ga. 435 (192 SE2d 154).

The Asheville authorities were, in effect, an extended arm of the Gwinnett County authorities in this situation. Therefore, if probable cause existed with the Gwinnett County police, they were justified in publishing

the bulletin, and the Asheville police were proper in making the arrest pursuant thereto. *Johnson v. State*, 230 Ga. 196 (1a) (196 SE2d 385).

Incident to the lawful arrest, search of the car stolen from the victims was likewise justified. *Johnson v. State*, 230 Ga. 196 (1b), supra. Moreover, under the circumstances here, the possibility of loss of the automobile and its contents as evidence also authorized the search. Chambers v. Maroney, 399 U. S. 42 (90 SC 1975, 26 LE2d 419); *Mitchell v. State*, 226 Ga. 450 (2) (175 SE2d 545); *Hood v. State*, 229 Ga. 435 (1), supra.

In addition, under prior holdings of this court, the appellant, having no property interest in the stolen automobile, lacked standing to complain of the search. *Dutton v. State*, 228 Ga. 850 (1) (188 SE2d 794) and citations

We, therefore, determine that the arrest and the subsequent search of the appellant and the automobile in his possession were lawful.

Second, in regard to the admissibility of the appellant's statements, his alleged confession and the testimony of Detective Blannott as to his conversations with appellant, the following evidence was manifest.

Immediately after the appellant's arrest (at approximately 3:15 p.m.) he was given a warning that complied fully with the requirements of Miranda v. Arizona and he signed a waiver of rights form reciting the Miranda warning. Officer Gibson of the Asheville Police Department was present. At about 11:30 p.m. the appellant was questioned by Detective Blannott of the Gwinnett County Police Department who determined that the appellant had been advised of his rights and that he understood them.

Appellant then made a statement to Detective Blannott wherein he claimed to have shot in self-defense but admitted taking the automobile and the money. As appellant was about to leave for Georgia with the Gwinnett County authorities he asked Officer Gibson for a cigarette. Officer Gibson gave him a cigarette and asked appellant why he killed these people. Appellant's response was, "By God, I wanted them dead."

Then, as already pointed out, on their return to Georgia with the appellant in custody, the Gwinnett County officers stopped at the intersection of Georgia 20 and I-85 shortly before five o'clock in the morning, and in the presence of the appellant, Allen narrated how the appellant shot the two men in accomplishing the robbery and then shot them in the head. At that point the Chief of the Gwinnett County Police Department asked appellant if that was how it happened and appellant replied that it was. The Chief then asked, "You mean you shot these men down in cold blooded murder just to rob them?" and the appellant replied, "Yes."

Approximately fourteen hours expired between the time the appellant was apprehended, advised of his rights and executed a waiver until the last incriminating statement was made. However, we cannot agree with his claim that the Miranda warnings had gone stale. See in this connection, *Watson v. State*, 227 Ga. 698 (182 SE2d 446) (7 or 8 hour lapse); *Moten v. State*, 231 Ga. 642 (203 SE2d 527) (2 day lapse).

Moreover, considering the totality of the circumstances, the record supports the determination by the judge and the jury in the Jackson v. Denno hearing that the statements were voluntarily made. *Wilson v. State*, 229 Ga. 395 (191 SE2d 783). Indeed, the appellant does not even contend that he was confused as to his right to remain silent or to have an attorney present.

Therefore, we rule that the statements and confession of the appellant were properly admitted in evidence. Since both the appellant and Detective Blannott testified, there was no problem of confrontation as was involved in *Bennett v. State*, 231 Ga. 458 (202 SE2d 99), and the testimony of Detective Blannott was likewise not erroneously admitted.

5. The enumeration complaining that the trial court erred in submitting the issue of death to the jury because such punishment constitutes cruel and unusual punishment contrary to the Eighth and Fourteenth Amendments of the United States Constitution cannot be sustained.

The appellant's death sentences were imposed pursuant to Ga. L. 1973, p. 159 (Code Ann. § 27-2534.1) and the constitutionality of that statute was upheld in

Coley v. State, 231 Ga. 829 (1) (204 SE2d 612); *House v. State*, 232 Ga. 140 (3) (205 SE2d 217); and *Eberheart v. State*, 232 Ga. 247 (1) (206 SE2d 12).

The constitutionality of the application of the death penalty to the appellant is determined in the sentence review by this court pursuant to the above statute in Division 6, infra.

6. In his final enumeration of error the appellant avers that the trial court erred in imposing four death sentences upon him. Inasmuch as this enumeration is directed to sentence appropriateness, the contentions urged in its support will be resolved in sentence review.

The death penalty in this case must conform to the standards set forth in Code Ann. § 27-2534.1, supra, if it is to pass the test of constitutionality. Thus this court must determine whether the sentences of death have been imposed under the influence of passion, prejudice, or any other arbitrary factor; whether the evidence supports the jury's finding of a statutory aggravating circumstance; and whether the sentences of death are excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, as required by Code Ann. § 27-2537 (c) (1, 3), supra.

We have reviewed the trial transcript and record, including the evidence, and we have made a comparison with the evidence and sentences in similar cases in accordance with the statutory mandate. Those similar cases considered by the court in reviewing the case are listed in an appendix attached to this opinion.

Using the standards prescribed for our review by the statute, our conclusion is that the sentences of death imposed here were not imposed under the influence of passion, prejudice or any other arbitrary factor.

In recommending the death penalty as to all four counts of the indictment, the jury found as follows: that the offenses of murder (Counts 1 and 3) were committed while the appellant was engaged in the commission of two other capital felonies, to wit, the armed robberies of Simmons and Moore (Code Ann. § 27-2534.1 (b, 2)) and for the purpose of receiving money and the automobile as described in the armed robbery indictments (Code Ann. § 27-2534.1 (b, 4)). The jury also found that the armed robberies were committed while the appellant was engaged in the commission of two capital felonies, to wit, the murders of Simmons and Moore (Code Ann. § 27-2534.1 (b, 2)), and for the purpose of receiving money and the automobile.

As we appraise it, the evidence supports the jury's findings of statutory aggravating circumstances as to the two counts of murder. After considering both the crimes and the defendant and after comparing the evidence and the sentences in this case with those of previous murder cases, we are also of the opinion that these two sentences of death are not excessive or disproportionate to the penalties imposed in similar cases which are hereto attached.

However, the death sentences imposed for the two armed robberies cannot be sustained.

Although there is no indication that these two sentences were imposed under the influence of passion, prejudice or any other arbitrary factor, the sentences imposed here are unusual in that they are rarely imposed for this offense. Thus, under the test provided by statute for comparison (Code Ann. § 27-2537 (b, 3)), they must be considered to be excessive or disproportionate to the penalties imposed in similar cases.

Furthermore, the two aggravating circumstances found by the jury in recommending death penalties for the two counts of armed robbery are not valid. Since the armed robberies were held to be aggravating circumstances authorizing the death penalties as to the murders, the murders cannot then be used in aggravation of the two armed robberies. The other aggravating circumstance enumerated by the jury in its verdict (commission of the armed robberies for the purpose of receiving money and the automobile) is not applicable to armed robbery since Code Ann. § 27-2534.1 (b, 4) refers only to the offense of murder, and thus it cannot be considered.

Therefore, as prescribed by the statute (Code Ann. § 27-2537 (c, 2)), the two sentences of death for the offenses of armed robbery must be set aside and the case remanded for resentencing by the trial judge on Counts

2 and 4 of the indictment, based upon the record and argument of counsel. The two death sentences for the offenses of murder (Counts 1 and 3 of the indictment) are affirmed.

See in this connection as to sentencing procedure, *Coley v. State*, 231 Ga. 829, supra; *House v. State*, 232 Ga. 140, supra; *Eberheart v. State*, 232 Ga. 247, supra.

Judgment affirmed in part; reversed in part. All the Justices concur, except Undercofler and Hall, JJ., who concur specially in Division 6, Ingram, J., who also concurs specially, and Gunter, J., who dissents.

APPENDIX

Similar cases considered by the court: *Henderson v. State*, 227 Ga. 68 (179 SE2d 76); *Hart v. State*, 227 Ga. 171 (179 SE2d 346); *Pass v. State*, 227 Ga. 730 (182 SE2d 779); *Watson v. State*, 229 Ga. 787 (194 SE2d 407); *Callahan v. State*, 229 Ga. 737 (194 SE2d 431); *Sirmans v. State*, 229 Ga. 743 (194 SE2d 476); *Scott v. State*, 230 Ga. 413 (197 SE2d 338); *Whitlock v. State*, 230 Ga. 700 (198 SE2d 865); *Kramer v. State*, 230 Ga. 855 (199 SE2d 805); *Bennett v. State*, 231 Ga. 458 (202 SE2d 99); *Howard v. State*, 231 Ga. 186 (200 SE2d 755); *Hunter v. State*, 231 Ga. 494 (202 SE2d 441); *Morgan v. State*, 231 Ga. 280 (201 SE2d 468); *House v. State*, 232 Ga. 140 (205 SE2d 217); *Allen v. State*, 231 Ga. 17 (200 SE2d 106); *Smith v. State*, 230 Ga. 876 (199 SE2d 793); *Johnson v. State*, 231 Ga. 138 (200 SE2d 734) *Lingerfelt v. State*, 231 Ga. 354 (201 SE2d 445).

INGRAM, Justice, concurring specially.

Division 6 of the court's opinion presents the question of whether the armed robberies, considered as aggravated circumstances to authorize the death sentence for the two murders, became included crimes in the murders. If so, the convictions for the two armed robberies must be reversed under Code Ann. § 26-506. "[A] crime is an included crime and multiple punishment therefor is barred if it is the same as a matter of fact or as a matter of law as specified in the Criminal Code." *State v. Estevez*, 232 Ga. 316, 319 (206 SE2d 475).

The factual and legal tests required by Code Ann. § 26-505 (a) and (b), respectively, for determining whether

the crimes are the same or not reveal that the armed robberies in this case are not included in the offenses of murder. They are separate crimes for which a conviction for each is authorized.

The consideration of the armed robberies as aggravating circumstances during the sentencing phase of the trial to authorize imposition of the death sentences for the murders does not make the armed robberies a part of the murder convictions. A prior conviction of some other armed robbery, if it existed, could have been considered as aggravating circumstances to authorize the death penalty and the mere fact that these armed robberies were contemporaneous with the murders would not prevent their use as aggravating circumstances in this case. Thus, I conclude there is no prohibition in either the statutory limitation on multiple prosecution for the same conduct or in the death penalty statute (Code Ann. § 27-2534.1) which would prevent the consideration of the armed robberies in this case as aggravating circumstances to authorize the death sentences for the two offenses of murder.

GUNTER, Justice, dissenting.

I dissent because it is my view that Georgia's death penalty statutes are unconstitutional. See the concurring part of my concurring and dissenting opinion in *Coley v. State*, 231 Ga. 829.

Also, 1974 enactments by the Georgia General Assembly on this subject are as follows: "In all capital cases, other than those of homicide, when the verdict is guilty, with a recommendation to mercy, it shall be legal and shall be a recommendation to the judge of imprisonment for life. Such recommendation shall be binding upon the judge." Ga. L. 1974, p. 353. And, "in all cases in which the death penalty may be imposed and which are tried by a jury, upon a return of a verdict of guilty by the jury, the court shall resume the trial and conduct a presentence hearing before the jury. Such hearing shall be conducted in the same manner as presentence hearings conducted before the judge as provided in subsection (a) of this section. Upon the conclusion of the evidence and arguments, the judge shall

give the jury appropriate instructions, and the jury shall retire to determine whether any mitigating or aggravating circumstances, as defined in Code Ann. § 27-2534.1, exist and whether to recommend mercy for the defendant. Upon the findings of the jury, the judge shall fix a sentence within the limits prescribed by law." Ga. L. 1974, p. 357.

I conclude that these 1974 enactments by the Georgia General Assembly expressly place discretion in the sentencing fact-finder to impose or not impose the death penalty in any case. And this is what I understand to be constitutionally impermissible under the decision of the Supreme Court of the United States in Furman v. Georgia, 408 U. S. 238 (92 SC 2726, 33 LE2d 346).

I respectfully dissent.

APPENDIX B

Pp. 25-46, Petition for Certiorari, Eberheart v. Georgia, No. 74-5174 (filed August 19, 1974).

1. Pre-Sentence Selective Mechanisms

Arbitrary selection operates well before sentencing to spare a substantial portion of Georgia capital defendants, although others similarly situated are ultimately sentenced to death. The principal importance of these pre-sentence selective mechanisms is that they provide an arbitrary sparing for all but a relative handful of defendants originally charged with capital crimes. But this screening out process is also significant because it effectively nullifies a key device upon which the new statute purportedly relies for the control of arbitrary discretion -- comparative review in the Georgia Supreme Court -- by limiting the base of the comparison to a fraction of the eligible population. See pp. 55-57, infra.

i. Prosecutorial Discretion

The impact of the district attorney's discretion on the administration of criminal justice in Georgia is enormous and is unaffected by the new capital punishment statute: "Whom he chooses to prosecute, what he charges them with, whether he charges them at all, whether he later drops the charges or recommends a lower sentence at the time of trial are all within the prosecutor's exercise of discretion."[12] In Georgia, the decision to prosecute and the choice of charges for which indictment will be sought are left to the district attorney's absolute, unguided discretion. The district attorney's mandate is simply

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12/ Note, Prosecutorial Discretion, 21 DE L. REV. 485, 486 (1971-1972).

"to prosecute all indictable offenses." Ga. Code Ann. §24-2908(4). In petitioner's case, for example, indictment might reasonably and responsibly have been sought for any one or any combination of the following crimes: rape (Ga. Code Ann. §26-2001), attempted rape (Ga. Code Ann. §§26-1001, 26-2001), aggravated sodomy (Ga. Code Ann. §26-2002), attempted aggravated sodomy (Ga. Code Ann. §§26-1001, 26-2002), kidnapping (Ga. Code Ann. §26-1311), attempted kidnapping (Ga. Code Ann. §§26-1001, 26-1311), false imprisonment (Ga. Code Ann. §26-1308), or attempted false imprisonment (Ga. Code Ann. §§26-1001, 26-1308), aggravated assault (assault with intent to commit rape, Ga. Code Ann. §26-1302), attempted aggravated assault (Ga. Code Ann. §§26-1001, 26-1302). The decision to prosecute petitioner for two capital crimes, (rape and kidnapping), one of which nearly always involves the other,[13] in a system where one feature that renders each crime potentially capital is its commission "while the offender was engaged in the commission of another capital felony," Ga. Code Ann. §27-2534.1(b)(2), is a striking example of the extent to which arbitrary prosecutorial decision-making may, quite literally, mean the difference between life and death.

13/ See note 26, infra.

The district attorney also has great discretion to enter a judgment of nolle prosequi. He must obtain the consent of the court,[14] but the standards for granting or denying such consent are nowhere specified. Ga. Code Ann. §27-1801.

Furthermore, the district attorney's discretion to plea bargain -- a process by which an estimated ninety per cent of all criminal cases are resolved[15] -- is utterly unfettered by the new capital punishment statute, or by any other significant restriction.[16] The fact that capital cases are likely to take up a great deal of time in preparation and trial makes them particularly likely to be settled by plea bargaining.[17] The peculiar harshness of a death sentence creates a relatively great risk that a conviction will be reversed on appeal for procedural error and increases the pressure to settle a capital case by a negotiated guilty plea:

14/ Once the case has been submitted to the jury, the district attorney must also obtain the consent of the defendant to enter a nolle prosequi. Ga. Code Ann. §27-1801.

15/ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967).

16/ See Thomason v. Caldwell, 229 Ga. 637, 194 S.E.2d 112 (1972).

17/ Alschuler, The Prosecutor's Role in Plea Bargaining, 36 U.CHI. L. REV. 50, 55 (1966).

> "Since time immemorial [prosecutors] will prefer to get a definite conviction, without the tremendous expense that goes with a . . . [capital] trial, the taking of a chance that a jury may not convict, or that some technical error will be made in the heat of trial which will result in a reversal by an appellate court." 18/

See Caldwell v. Paige, 230 Ga. 456, 197 S.E.2d 692 (1973) (plea bargain made after death sentence reversed).

ii. Jury Discretion

Although the new Georgia capital punishment statute expressly confers sentencing discretion upon the trial jury following conviction, see pp. 32-36, infra, that is not the first or only means available to the jury to spare the defendant's life in cases where, if otherwise disposed, it might choose to sentence him to die. At the first stage of Georgia's bifurcated trial, the jury may convict him of a lesser offense, or it may recognize some amorphous and subjectively defined defense and acquit him altogether.

A Georgia trial judge must charge lesser included offenses when they are established under any view of the evidence, Sims v. State, 203 Ga. 668, 47 S.E.2d 862 (1948) and may give such a charge "where, from the evidence or from the defendant's statement at the trial, there is anything deducible which would tend to show that he was guilty of [the lesser offense] . . . or which would be sufficient to raise a doubt as to which of these grades [of the offense] . . . was committed." Echols v. State, 46 Ga.

18/ Bedau, Death Sentences in New Jersey, 19 RUTGERS L. REV. 1, 30 (1963).

668, 168 S.E. 790 (1933)(emphasis in original), citing Reeves v. State, 22 Ga. App. 628, 97 S.E. 115 (1918). Moreover, a charge regarding a lesser offense is essentially immune from appellate scrutiny even though it is entirely inconsistent with the evidence presented at trial. Williams v. State, 204 Ga. 837, 51 S.E.2d 825, 830 (1949).

The jury may convict of criminal attempt even though the crime was consummated, Ga. Code Ann. §26-1004, and despite the prosecutor's failure to charge the crime of attempt, Ga. Code Ann. §26-1005. It may convict of an assault with intent to commit a crime even though the crime was consummated, Ga. Code Ann. §26-1303.[19]

19/ Prior to 1968 the Georgia Criminal Procedure Code provided that a person could not be convicted of an attempt or of an assault with intent to commit a crime if the intended crime was actually perpetrated. Ga. Code Ann. §27-2508(1967). It had therefore been held that conviction of a lesser crime involving attempt was unauthorized where the evidence established that the attempt was consummated. See Hicks v. State, 86 Ga. App. 365, 71 S.E.2d 695 (1952); Pack v. State, 93 Ga. App. 737, 92 S.E.2d 824 (1956). The new Georgia Criminal Code provides, however, that "[a] person may be convicted of criminal attempt if the crime attempted was actually committed in pursuance of the attempt" (Ga. Code Ann. §26-1004) and that "[a] person may be convicted on [sic] an assault with intent to commit a crime if the crime intended was actually committed as a result of the assault." Ga. Code Ann. §26-1303. See, Jones v. Smith, 228 Ga. 648, 187 S.E.2d 298 (1972).

Similarly, dicta in older cases which suggest that conviction for the crime of robbery by intimidation would be unauthorized where the use of an offensive weapon had been proved, see e.g. Daniels v. State, 219 Ga. 381, 133 S.E.2d 357, 360 (1963), are seemingly superceded by 1968 amendments which removed the requirement that the crime of robbery by intimidation be committed without the use of such a weapon, compare former Ga. Code Ann. §26-2503(1967) with present §§26-1901 and 26-1902, and specifically provided that "[t]he offense robbery by intimidation shall be a lesser included offense in the offense of armed robbery." Ga. Code Ann. §26-1902.

The jury is thus given considerable unreviewable discretion -- contingent, of course, upon the exercise of discretion by the trial court in the choice of crimes on which the jury will be instructed[20] -- to convict a capital defendant of a lesser offense, not only in cases where the distinctions between crimes or degrees of offense are blurred, but also in cases where conviction of the lesser offense would be wholly inconsistent with the facts proved.

A jury may also be instructed to acquit on the basis of necessarily speculative and imprecise determinations regarding the state of the defendant's mind at the time of the crime. Acquittal is authorized when, at the time of the alleged crime, the defendant "lacked the mental capacity to distinguish between right and wrong," Ga. Code Ann. §26-702, suffered "a delusional compulsion . . . which overmastered his will," Ga. Code Ann. §26-703, or was acting on the basis of "a misapprehension of fact, which, if true, would have justified the act", Ga. Code Ann. §26-705.[21] Acquittal may also be based upon prescribed justifications, the determination of which involves not only findings as to the defendant's state of mind at the time of the crime, but also judgments as to the reasonableness of the defendant's conduct. Such judgments will inevitably vary with

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20/ See note 27, infra.

21/ Both rape, Ga. Code Ann. §26-2001, and kidnapping, Ga. Code Ann. §26-1311, involve acts committed "against [the] will" of the victim, and since consent would be a defense to both crimes, a defendant charged with rape or kidnapping might attempt to prove a "misapprehension of fact" justification with regard to consent.

the mores of the deciders. Justification is a defense defined in vague, subjective terms in a variety of enumerated situations (Ga. Code Ann. §§26-901(a)-(e), 902-904, 906) and is also allowed "[i]n all instances which stand upon the same footing of reason and justice as those enumerated . . . ." Ga. Code Ann. §26-902(f) (emphasis added). The fluid nature of these concepts, which are "notoriously refractory to the best-instructed human understanding,"[22] as Justice Cardozo recognized long ago when analyzing the distinction between first and second degree murder, affords the jury an indirect "dispensing power" of mercy vouchsafed them "in a mystifying cloud of words."[23]

22/ Black, Crisis in Capital Punishment, 31 MD. L. REV. 289,299 (1971).

23/ CARDOZO, LAW AND LITERATURE (1931) 99.

2. Sentencing Discretion

Once a Georgia defendant has been convicted of a capital crime, the sentencer has absolute discretion to impose a sentence of life imprisonment, since the procedure of finding "aggravating" and "mitigating" circumstances at the second stage of a bifurcated proceeding does not -- and was not intended to -- confine the unfettered power of the sentencer to spare the life of a sympathetic capital defendant.[24] See Furman v. Georgia, 408 U.S. 238, 401 (1972) (Mr. Chief Justice Burger, dissenting). The finding of a statutory "aggravating circumstance" and no "mitigating circumstances" does not compel a sentencing jury to impose a death sentence, because the statute also requires the jury to make a "recommendation of death," Ga. Code Ann. §§26-3102, 27-2534.1(c).[25]

24/ See C. Brewster, The Georgia Death Penalty Statute - Is It Constitutional, Even After Revision? 3 GA. J. CORR. 14, 18 (Winter, 1974).

25/ The intent of the statute to confer this discretion on the sentencing jury is made explicit by examination of Ga. Laws, 1973, p. 171, Act No. 74, which prohibits a trial judge from imposing a death sentence in a rape or kidnapping case after the defendant has pleaded guilty unless the trial judge finds one of the "statutory aggravating circumstances," but which also provides that the "judge . . . may, in his discretion, . . . sentence such person to life imprisonment, or to any lesser punishment authorized by law for the offense named in the indictment." Ibid. (emphasis added). Thus, although the trial judge may not sentence to death a defendant who pleads guilty without finding a "statutory aggravating circumstance," he still has complete unfettered discretion not to impose the death penalty. Plainly, the legislature intended the sentencing jury to exercise a similar discretion, for the procedure would otherwise be in violation of United States v. Jackson, 390 U.S. 570 (1968). See Comment, Constitutional Law-Capital Punishment-Furman v. Georgia and Georgia's Statutory Response, 24 MERCER L. REV. 891, 931 (1973).

The particular "aggravating circumstances" specified in the statute are extremely vague, all-encompassing, and open to different interpretations in like cases, depending upon the subjective judgment of the sentencer. Terms like "substantial history of serious assaultive criminal convictions," Ga. Code Ann. §27-2534.1(1), creation of a "great risk of death to more than one person," Ga. Code Ann. §27-2534.1(3), and use of a "weapon or device which would normally be hazardous to the lives of more than one person" id., are extremely imprecise and leave great freedom to the trial judge or jury to define their content. In addition to the great vagueness of these phrases, their coverage is extraordinarily broad. To allow the sentencer to impose a death penalty if the crime of rape or kidnapping is "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim," Ga. Code Ann. §27-2534.1(7), is potentially to authorize capital punishment for any rape or kidnapping.[26] Furthermore, the list

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26/ The great breadth of the new statute's potential coverage is also illustrated by the fact that one of the "statutory aggravating circumstances" found by the jury in this case (that the rape occurred during the course of a kidnapping) may be found in almost any rape case to justify a death sentence. Ga. Code Ann. §26-1311(a) provides that "[a] person commits kidnapping when he abducts or steals away any person without lawful authority or warrant and holds such person against his will." Since the new capital punishment statute enumerates "kidnapping" rather than "kidnapping for ransom," as defined in Ga. Code Ann. §26-1311(b), as a "statutory aggravating circumstance," it follows that the forcible detention and momentary abduction which are a part of almost any rape may qualify as a "kidnapping" which authorizes a sentencer to impose the death penalty. See Henderson v. State, 227 Ga. 68, 179 S.E.2d 76, 84-85 (1970).

The finding of an "aggravated battery" is also a "statutory aggravating circumstance" which justifies a jury's death verdict for the crime of murder. Ga. Code §26-1305 defines "Aggravated Battery" as follows:

of statutory "aggravating circumstances" is not exclusive or exhaustive, so that even if the foregoing "aggravating circumstances" did somehow curb the sentencer's discretion, the sentencer is still free to consider any "aggravating circumstances otherwise authorized by law." Ga. Code Ann. §27-2534.1(b). Exactly what this phrase means is obscure but it is clear that there is very little limitation on the nature or scope of evidence in aggravation which may be heard or considered.[27] While

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26/ cont'd.

> "A person commits aggravated battery when he maliciously causes bodily harm to another by depriving him of a member of his body, or by rendering a member of his body useless, or by seriously disfiguring his body or a member thereof."

It appears, therefore, that a jury would be justified in returning a death verdict in any murder case, on the basis of the existence of this "statutory aggravating circumstance."

27/ The ambiguous provisions of the statute which empower the trial judge to instruct upon aggravating and mitigating circumstances magnify the effect of the vagueness of the statutory circumstances themselves in jury trials. The trial judge "shall include" in his instructions "any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence." Ga. Code Ann. §27-2534.1(b) (emphasis added). Again, the trial judge is to give such "statutory instructions" as he determines "to be warranted by the evidence" in writing to the jury. Ga. Laws, 1973, p. 165, Act No. 74 (emphasis added). It is not certain whether "supported by the evidence" is equivalent to "warranted by the evidence" and, if it is, it is unclear what the standard is. The trial judge thus has an enormous discretion to present to the jury reasons to impose or not impose the death sentence in the case before it.

the statute sets forth certain factors in aggravation for the jury to consider, it nowhere directs that the jury may not consider other factors in aggravation. The statute does "no more than suggest some subjects for the jury to consider during its deliberations." McGautha v. California, 402 U.S. 183, 207 (1971).

The statute does not define "mitigating circumstances," and the sentencer is therefore free in any case to consider anything a mitigating factor which should justify mercy.[28] There is thus no case at all in which the sentencer might not conclude that some factual element was present which entitled the defendant to a lesser sentence than death.[29]

28/ There is no limitation, see Ga. Laws, 1973, p. 162, Act No. 74, upon the arguments which can be made by the defendant and prosecutor on the issue of punishment:

> "If the purpose of this Act is to strictly limit discretion in sentencing in capital cases, one wonders what must be the purpose of such a wide-open allowance of evidence and arguments in mitigation and aggravation . . . . If the state desires to comport with [Furman] . . . which indicated that . . . discretion might be greatly restricted by limiting considerations to specific, objective, statutorily-prescribed guidelines, why, then, should the hearing of arguments and evidence in mitigation and aggravation remain unrestricted?"

Comment, Constitutional Law-Capital Punishment-Furman v. Georgia and Georgia's Statutory Response, 24 MERCER L. REV. 891, 932 (1973) (emphasis in original).

29/ This was made clear in the instant case when the following colloquy occurred:

> "MR. ENGLISH[Petitioner's counsel]: Your Honor, this law does not spell out what is mitigating circumstances . . . .
>
> THE COURT: Well, mitigating circumstances would be anything that he could show in his own behalf -- in other words, to show mitigation."

T. 185.

In short, under the sentencing provisions of the new Georgia capital punishment statute, any case becomes a possible one for the death penalty or for life imprisonment, and total discretion is left to jurors and trial judges to determine whether any particular defendant shall be put to death. This statute is one in which "the legislature does not itself mandate the penalty in any particular class or kind of case (that is, legislative will is not frustrated if the penalty is never imposed), but delegates to judges and juries the decision as to those cases, if any, in which the penalty will be utilized." Furman v. Georgia, 408 U.S. 238, 310-311 (1972) (Mr. Justice White, concurring).[30]

30/ At the time of Furman v. Georgia, several states had limitations on the jury's discretion to make the life-death choice and standards for the appropriate exercise of that discretion. Death sentences from these states were nevertheless uniformly held unconstitutional. Davis v. Connecticut, 408 U.S. 935 (1972)(see Conn. Gen. Stat. Ann., §53-10); Moore v. Illinois, 408 U.S. 786 (1972)(see People v. Black, 367 Ill. 209, 10 N.E.2d 801, 804 (1937); People v. Sullivan, 345 Ill. 87, 177 N.E. 733 (1933); Ill. Rev. Stat., c. 38, §1-7-(c)(1)); Alvarez v. Nebraska, 408 U.S. 937 (1972)(see Sundahl v. State, 154 Neb. 550, 48 N.W.2d 689, 704 (1951)); Billingsley v. New Jersey, 408 U.S. 934 (1972) (see N. J. Stat. Ann., §2A:113-4(1969); State v. Reynolds, 41 N.J. 163, 195 A.2d 449 (1963)); Duling v. Ohio, 408 U.S. 936 (1972) (see State v. Tudor, 154 Ohio St. 249, 95 N.E.2d 385, 390 (1950); State v. Eaton, 19 Ohio St. 145, 249 N.E.2d 897 (1969)); Herron v. Tennessee, 408 U.S. 939 (1972)(see Tenn. Code Ann., §39-2405 (1955); Woodruff v. State, 164 Tenn. 530, 51 S.W.2d 843, 847 (1932)).

3. Post-Sentence Selective Mechanisms

i. Appellate Review

Although this Court, concurrently with Furman v. Georgia, and on its authority, reversed death sentences which had been reviewed by state appellate courts and affirmed on the express ground that the facts and circumstances warranted the extreme penalty,[3/] the Georgia legislature has apparently chosen to rely upon a similar review procedure as a response to Furman.

> "[T]he new statute provides for automatic and swift appellate review to insure that the death penalty will not be carried out unless the evidence supports the finding of one of the serious crimes specified in the statute. The statute also requires comparative sentencing so that if the death penalty is only rarely imposed for an act or it is substantially out of line with sentences imposed for other acts it will be set aside as excessive. And, finally, the statute requires this court to make certain the record does not indicate that arbitrariness or discrimination was used in the imposition of the death sentence."

31/ See e.g. Alford v. Eyman, 408 U.S. 939 (1972) (see State v. Alford, 98 Ariz. 124, 402 P.2d 551, 557 (1965); Ariz. Rev. Stat., §13-1717); Hurst v. Illinois, 408 U.S. 935 (1972) (see People v. Hurst, 42 Ill.2d 217, 247 N.E.2d 614 (1969)); Alvarez v. Nebraska, 408 U.S. 937 (1972) (see State v. Alvarez, 182 Neb. 358, 154 N.W.2d 746, 748 (1967); Neb. Rev. Stat., §29-2308); Fesmire v. Oklahoma, 408 U.S. 935 (1972) (see Fesmire v. State, 456 P.2d 573, 586-587 (Okla Ct. Cr. App. 1969)); Phelan v. Brierly, 408 U.S. 939 (1972) (see Commonwealth v. Phelan, 427 Pa. 265, 234 A.2d 540 (1967); cf. Commonwealth v. Heush, 358 Pa. 247, 56 A.2d 84, 85-86 (1948) with Commonwealth v. Edwards, 380 Pa. 52, 110 A.2d 216, 217 (1955)).

The Court reversed death sentences from these states even though these same state appellate courts had a regular and recent practice of reversing death sentences when such sentences were found to be unwarranted upon a consideration of aggravating and mitigating circumstances.

See e.g. State v. Maloney, 105 Ariz. 348, 464 P.2d 793 (1970); People v. Crosby, 42 Ill.2d 60, 244 N.E.2d 593 (1969); State v. [illegible], [illegible] P.2d 399 (Okla. Ct. Crim. App. 1969); Commonwealth v. Green, 396 Pa. 137, 151 A.2d 241 (1959).

Coley v. State, __Ga.__, 204 S.E.2d 512, 516 (1974). This review process whereby the Supreme Court of Georgia is asked to determine "[w]hether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor," "[w]hether . . . the evidence supports the . . . finding of a statutory aggravating circumstance," and "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar . . . cases, considering . . . both the crime and the defendant," Ga. Code Ann. §27-2537(c) in fact exacerbates the arbitrariness of capital sentencing.

First, the vagueness and breadth of the statutory "aggravating circumstances" means that the death penalty can be imposed in virtually any capital case, while the fact that "mitigating circumstances" are undefined means that the jury can find a reason to afford mercy to any capital defendant. Given this enormous statutorily-authorized sentencing discretion, it is difficult to see how the Georgia Supreme Court can determine whether "any . . . arbitrary factor" influenced the sentencing deliberations.

Second, the Georgia Supreme Court's reliance on cases that are appealed[32/] as a standard for determining whether a "sentence

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32/ The new Georgia statute requires a trial judge's report only in cases where a death sentence is actually imposed. Ga. Code Ann. §27-2537(a). The statute also directs the Georgia Supreme Court to "accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate," Ga. Code Ann. §27-2537(f). Preparation of a formal appellate "record" occurs, of course, only in those cases which are appealed, and it is purely fortuitous whether defendants sentenced to life in cases factually like those of any particular condemned defendant will choose to appeal. In the three death sentences thus far reviewed by the Georgia

of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant," Ga. Code Ann. §27-2537(c)(3), will provide no reliable guide to whether the death penalty is being uniformly imposed under similar factual circumstances. A comparative sample consisting only of cases appealed to the Georgia Supreme Court is drastically skewed in two ways. Otherwise eligible cases are ignored which involve similar factual circumstances but which were disposed of by various selective mechanisms described above (for example, the case of a co-defendant convicted of assault with intent to rape). See pp. 25-31, supra. No account is taken of those capital crime convictions where a life sentence is imposed and no appeal is taken (for example, the case of a co-defendant who pleaded guilty to rape in return for a life sentence). The myopia inherent in this scheme will prevent ascertainment of the penalties normally imposed in particular circumstances.[33]

32/ cont'd.

Supreme Court, the required list of "similar cases which [the Court] . . . took into consideration," Ga. Code Ann. §27-2537(e), has contained only capital convictions which were subjected to appellate review. See Coley v. Georgia, __Ga.__, 204 S.E.2d 512, 618 (1974); House v. State, __Ga.__, 205 S.E.2d 217, 222-223 (1974); Eberheart v. State, __Ga.__, 206 S.E.2d 12, 18 (1974) (App.A at 7a).

33/ See C. Brewster, The Georgia Death Penalty Statute -- Is It Constitutional, Even After Revision? 3 GA. J. CORR. 14, 19 (Winter, 1974) for hypothetical examples of the inequities produced by this form of appellate review.

Third, the appellate review provisions of the new statute explicitly authorize comparison of death sentences with sentences in pre-Furman v. Georgia cases tried under procedures which this Court has already condemned because they lent themselves to arbitrary and discriminatory application. The Georgia Supreme Court is directed to consider "capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate," Ga. Code Ann. §27-2537(f), and all but one of the cases listed in the "Similar cases considered by the court" appendices of the three death cases reviewed by the Georgia Supreme Court under the new statute were decided under statutes whose death penalty procedures were invalidated by Furman v. Georgia.[34] The result, of course, is a perpetuation of the Eighth Amendment arbitrariness condemned by this Court on June 29, 1972. For post-Furman v. Georgia, death sentences are affirmed or reversed on the basis of their conformity with a "standard" consisting of cases in which the death penalty was "wantonly and . . . freakishly imposed," Furman v. Georgia, supra, at 310 (Mr. Justice Stewart concurring), at a time when "there [was] . . . no meaningful basis for distinguishing the few cases in which it [was] . . . imposed from the many

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34/ See Coley v. Georgia, __Ga.__, 204 S.E.2d 512, 618 (1974); House v. State, __Ga.__, 205 S.E.2d 217, 222-223 (1974); Eberheart v. State, __Ga.__, 206 S.E.2d 12, 18 (1974) (App.A at 7a).

The Coley case itself, listed in the Eberheart appendix, is the only case cited which was not decided under capital procedures which this Court held invalid in Furman because they lent themselves to arbitrary and discriminatory imposition of the death sentence.

cases in which it [was] . . . not," id. at 313 (Mr. Justice White concurring) and when "the discretion of judges and juries in imposing the death penalty enable[d] the penalty to be selectively applied, feeding prejudices against the accused if he [were] . . . poor and despised, lacking political clout, or if he [were]. . . a member of a suspect or unpopular minority." Id. at 255 (Mr. Justice Douglas, concurring).

Finally, the Georgia Supreme Court's failure to provide reasoned opinions in support of its sentence review decisions makes it impossible to determine whether this procedure is fulfilling its ostensible purpose. For in petitioner's case, and in the two other death cases the Court has reviewed under the new statute, the Court has merely asserted that a particular death sentence did (or did not) pass muster under the statutory standards. 35/

35/ The Georgia Supreme Court merely made the conclusory statement that petitioner's death sentence was appropriate under the new statute:

> "In accord with the statutory mandate we have reviewed the trial transcript and record including the evidence and made a comparison with the evidence and sentences in similar cases. Those similar cases we considered in reviewing the case are listed in an appendix attached to this opinion. Using the standards prescribed for our review by the statute, we conclude that the sentences of death imposed in this case were not imposed under the influence of passion, prejudice or any other arbitrary factor, and the evidence supports the jury's finding of statutory aggravating circumstances. Considering both the crime and the defendant, and after comparing the evidence and sentences in this case with that of previous cases, we conclude the sentences of death are not excessive or disproportionate to the penalty imposed in similar cases."

[illegible], __Ga.__, 206 S.E.2d 12, 18 (1974) (App. A at [illegible]). At the end of its opinion, the Court attached the following appendix:

In each case, the Court provided a list of cases it had "considered," but it did not articulate any principles which would rationalize the cases, indicate what elements of the case under review mandated (or did not mandate) a death sentence, describe the factual circumstances in cases where the appellate report does not disclose them, explain why certain other cases were not considered, or demonstrate how the facts of the case under review merited a harsher sentence than had been imposed in other cases where

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35/ cont'd.

> "Similar cases considered by this court: Miller v. State, 224 Ga. 627, 163 S.E.2d 730; Henderson v. State, 227 Ga. 68, 179 S.E.2d 76; Ford v. State, 227 Ga. 279, 180 S.E.2d 545; Watson v. State, 227 Ga. 698, 182 S.E.2d 446; Lumpkin v. State, 228 Ga. 391, 185 S.E.2d 770; Fuller v. State, 228 Ga. 546, 186 S.E.2d 888; Allen v. State, 228 Ga. 859, 188 S.E.2d 793; Griffin v. State, 229 Ga. 165, 190 S.E.2d 61; Hobbs v. State, 229 Ga. 556, 192 S.E.2d 903;McCrary v. State, 229 Ga. 733, 194 S.E.2d 480; Grantling v. State, 229 Ga. 746, 194 S.E.2d 405; Massey v. State, 229 Ga. 816, 195 S.E.2d 28; Akins v. State, 231 Ga. 411, 202 S.E.2d 62; Coley v. State, 231 Ga. 829, 204 S.E.2d 612."

206 S.E.2d at 18 (App. A at 72).

apparently more aggravated crimes had received lighter sentences.[36]

36/ Cf. e.g. Penland v. State, 229 Ga. 256, 190 S.E.2d 900 (1972) (appellant received twenty year sentence for rape and aggravated sodomy; when law enforcement officers found the victim:

> "she was almost nude; . . . her head was a complete mass of blood and her body was covered with mud, cuts, and bruises, . . . her eyes were swollen shut; . . . she was incoherent . . . The victim testified in detail as to what had occurred, relating that the defendant by threats and by beating her with his hands, a stick, and a tire tool, forced her to submit to several acts of each of the offenses."

190 S.E.2d at 900-901); Riggins v. State, 226 Ga. 381, 174 S.E.2d 908 (1970) (life sentence for rape reversed for trial error: the "evidence show[ed] the victim was brutally beaten, abused and raped by the [appellant]" and that she was taken to a hospital and "was treated for extensive physical injuries" shortly after the rape. 174 S.E.2d at 912); Bussie v. State, 230 Ga. 440, 197 S.E.2d 344 (1973) (appellant given ten year sentence for rape of ten year old child: victim testified that appellant "placed a knife against her neck and took her to a railroad box car and raped her," 197 S.E.2d at 344); Ford v. State, 227 Ga. 279, 180 S.E.2d 545 (1971) (life sentence for rape: appellant was one of three men committing rape; victim left "disheveled," "hysterical," and suffering "abrasions in the area at the opening of the vagina," 180 S.E.2d at 547); Griffin v. State, 229 Ga. 165, 190 S.E.2d 61 (1972) (life sentence for rape: victim was abducted and "forcibly raped in rapid succession by four or five men, including the [appellant]," 190 S.E.2d at 63); Hobbs v. State, 229 Ga. 556, 192 S.E.2d 903 (1972) (life sentence for rape: appellant found guilty of perpetrating a rape which resulted in "bruises, scratches, abrasions about the [victim's] face, neck and other parts of her body," 192 S.E.2d at 907); Watson v. State, 227 Ga. 698, 182 S.E.2d 446 (1971) (life sentence for rape: appellant subdued his victim with a pistol, handcuffed her to the bed, and raped her: "[s]everal witnesses [described her] as crying, [with] her hair ruffled up, emotionally upset, with bleeding handcuff marks on her hands," 182 S.E.2d at 449). Cf. also Teague v. State, 208 Ga. 459, 67 S.E.2d 467, 469 (1951); Martin v. State, 207 Ga. 482, 62 S.E.2d 158 (1950); Jones v. State, 213 Ga. 814, 102 S.E.2d 21 (1958); Stevens v. State, 222 Ga. 603, 151 S.E.2d 127 (1966); Coleman v. State, 215 Ga. 865, 114 S.E.2d 2 (1960). Of course, these cases may be distinguishable on the basis of facts unascertainable from the reported appellate decisions or by a logic that is not apparent and has not been spelled out by the Georgia Supreme Court. But surely a sentencing-review system is inadequate if it relies on comparisons involving unknowable facts mediated by unarticulated principles. See pp. 49-50, infra.

ii, Executive Clemency.

The capital defendant who fails to escape the death penalty during the charging, plea bargaining, guilt determination, and sentencing processes is subjected to a final lottery in which the Executive Department (the three members of the Board of Pardons and Paroles acting with the consent of the Governor) has absolute discretion to spare his life or permit his execution. Georgia Constitution, art. V, §2-3011, par. XI, Ga. Code Ann. §77-511. There are no standards whatsoever for the exercise of the commutation power, and the state courts have "no jurisdiction" to review the grant or denial of a commutation in a death case. Parks v. State, 206 Ga. 675, 58 S.E.2d 142, 145 (1950). In the eighteen years between 1946 and 1963, 41 of 187 condemned prisoners (22%) were spared by executive clemency.[37] In view of the precipitous decrease in the number of executions over the past few decades, it appears reasonable to assume that under the new Georgia death penalty statutes, a significant number of those defendants condemned to die will be spared through the exercise of the freakish mercy of executive clemency.

The preceding review of the post-Furman v. Georgia modifications in Georgia's capital procedures reveals that discretionary opportunities for imposition or avoidance of the penalty are,

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37/ Note, Executive Clemency in Capital Cases, 39 N.Y.U. L. REV. 136, 192 (1964).

in fact, as numerous and as unregulated as in the pre-June 29, 1972 period. It is not surprising that only a handful of defendants have been condemned (17 in 16 months)[38] in a State which reported 871 murders and non-negligent manslaughters, 984 forcible rapes, and 6,340 robberies in the twelve months of 1972.[39] Of course, the point is not only that the death penalty continues to be imposed so rarely in such an insignificant fraction of eligible cases that its regular and even-handed use and its general acceptance as a functioning part of the State's criminal law machinery are called into question. The more fundamental defect is that the arbitrary selectivity condemned in Furman v. Georgia has been carefully preserved in Georgia's modified capital procedures. After Furman, Georgia "was confronted with the serious task of devising a new . . . system consonant with her own political ideas but also consistent with the Federal Constitution." Lane v. Wilson, 307 U.S. 268, 275 (1938). The question now presented for this Court's consideration is whether the 1973 statute "partakes too much of the infirmity" of the pre-Furman v. Georgia system "to be able to survive." Ibid.

This question is important both to the prisoners condemned under the new Georgia statute and to the resolution of constitutional questions of broad national significance. For the Georgia legislation represents one of the major devices used by retentionist states to avoid the effect of the Furman ruling. Several states have devised more or less elaborate procedures involving "aggravating" and "mitigating" circumstances -- much like those of Georgia described in subsection 2, supra -- for the exercise of disguised arbitrary selectivity in sentencing. Other states, such as North Carolina, have adopted "mandatory" death penalties for grades or kinds of offenses but have built significant discretionary elements into the definition of these capital classifications and have taken no steps to control the kinds of arbitrary selectivity described in subsections 1 and 3, supra. By granting review in this case, and in cases pending on certiorari to the Supreme Court of North Carolina,[40] this Court will have an opportunity to consider the full range of devices now being used in the attempt to reinstitute the death penalty after Furman v. Georgia despite strong national resistance to its frequent and routine application.

38/ See note 5, supra.

39/ UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 1972 (1973) at 69. These totals are reported crimes, not convictions, and they cannot be said to represent the total of murders, rapes, and robberies reported in Georgia in 1972 for which a death sentence might be imposed. The FBI Uniform Crime Reports do not tabulate statistics for reported acts of kidnapping, treason, and aircraft hijacking.

40/ Hilliard v. North Carolina, No. 73-6875 (filed June 11, 1974); Henderson v. North Carolina, No. 73-6853 (filed June 8, 1974); Noell v. North Carolina, No. 73-6876 (filed June 11, 1974); Jarrette v. North Carolina, No. 73-6877 (filed June 11, 1974); Crowder v. North Carolina, No. 73-6878 (filed June 11, 1974); Fowler v. North Carolina, No. 73-7031 (filed July 9, 1974); Honeycutt v. North Carolina, No. 73-7032 (filed July 9, 1974).

APPENDIX C

Pp. 45-51, Petition for Certiorari, Dillard v. North Carolina, No. 73-6875 (filed June 11, 1974).

D. The Inconsistency Of The Death Penalty With Contemporary Standards of Decency

Eighth Amendment standards are not static, and the prohibitions of the cruel-and-unusual punishment clause are not "confine[d] . . . to such penalties and punishments as were inflicted by the Stuarts." Weems v. United States, 217 U. S. 349, 372 (1910). Instead, the clause is "progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice," Id. at 378, and informed by "the light of contemporary human knowledge." Robinson v. California, 370 U. S. 660, 666 (1962). There was no disagreement among the Justices who reached the issue in Furman v. Georgia that this evolutionary standard authorized the periodic Eighth Amendment re-evaluation of hoary criminal punishments. See Furman v. Georgia, supra, at 242 (opinion of Mr. Justice Douglas); at 264-269 (opinion of Mr. Justice Brennan); at 325-328 (opinion of Mr. Justice Marshall); at 383 (opinion of Mr. Chief Justice Burger); at 409 (opinion of Mr. Justice Blackmun); at 429 (opinion of Mr. Justice Powell). Such a re-evaluation of the penalty of death is particularly appropriate at this historical juncture, for three principal reasons:

First: The cruelty and inutility of the death penalty are apparent in an age when "contemporary human knowledge," draws upon advanced medical science and sciences of human behavior. We are no longer so uninformed about the complex sources and motivations of anti-social behavior as to maintain the simplistic and beguiling notion that the threat of death deters serious crime; nor can we ignore today the the truism that government remains "the potent, the omnipresent teacher"[46/] even when it chooses to

46/ Olmstead v. United States, 277 U. S. 438, 485 (1928) Justice Brandeis, dissenting).

teach the overriding lesson of capital punishment "'that a man's life ceases to be sacred when it is thought useful to kill him.'"[47] While we have not abandoned the essential moral and social proposition that the citizen is responsible to society for his or her conduct, new knowledge of the subtle springs of human behavior has led to a reconsideration of the justifications for retributive punishments,[48] a partial diminution of retributive sentiment, and a guarded, but increased optimism about the possibilities of rehabilitation. At the same time, society has developed sophisticated means for safely isolating dangerous criminal offenders.

To the extent that contemporary human knowledge casts doubt on the utility of capital punishment in achieving the legitimate aims of criminal sanctions, it casts doubt on the legitimacy of capital punishment in Eighth Amendment terms. If it cannot be established that the death penalty is a superior deterrent, and if it cannot be shown that the death penalty is necessary to isolate dangerous offenders, reinforce moral standards of (if retribution

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47/ Camus, Reflections on the Guillotine, in CAMUS, RESISTANCE, REBELLION AND DEATH 173, 229 (1961).

48/ ". . . a cloud of doubt has settled over the keystone of 'retributive' theory. Its advocates can no longer speak with the old confidence that statements of the form 'This man who has broken a law, could have kept it' had a univocal or agreed meaning; or where scepticism does not attach to the meaning of this form of statement, it has shaken the confidence that we are generally able to distinguish the cases where a statement of this form is true from those where it is not." H.L.A. Hart, PUNISHMENT AND RESPONSIBILITY (1968), at 1.

is considered a legitimate aim of penal sanctions) a civilized society's measure of justice, then it is surely impossible for any governmental organ to justify the decision made below by a single vote of the North Carolina Supreme Court: to "extinguish, after untellable suffering, the most mysterious and wonderful thing we know, human life."[49] Mr. Justice White wrote in Furman that:

> "The imposition and execution of the death penalty are obviously cruel in the dictionary sense. But the penalty has not been considered cruel and unusual punishment in the constitutional sense because it was thought justified by the social ends it was deemed to serve. At the moment it ceases realistically to further these purposes, however, the emerging question is whether its imposition in such circumstances would violate the Eighth Amendment." 408 U. S. at 312.

At a time when the death penalty is and inevitably will continue to be rarely imposed, and when empirical data fail to substantiate that its imposition is "of substantial service to criminal justice" (id. at 313) in any case, the question is squarely presented whether death as a punishment for crime is consistent with any morality that our society can forthrightly accept.

Second: The rarity with which the death penalty is imposed today signifies repudiation of its regular use. The Court in Furman confronted an accepted system which sent an exceedingly small number of persons[50]--who were, for the most part, members of

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49/ Black, Crisis in Capital Punishment, 31 MD. L. REV. 289, 291 (1971).

50/ "The most salient characteristic of capital punishment is that it is infrequently applied . . . [A]ll available data indicate that judges, juries and governors are becoming increasingly reluctant to impose or authorize the carrying out of a death sentence." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND

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powerless or despised minorities--to die in secret for crimes punished less severely in the vast majority of cases.

> "[T]oday society will inflict death upon only a small sample of the eligible criminals. Rejection could hardly be more complete without becoming absolute." Furman v. Georgia, supra, at 309 (Brennan, J. concurring).

The Furman majority rightfully looked to what the public conscience will allow the law to do, as opposed to what it will permit the law to threaten. In the words of Mr. Justice Brennan, "The objective indicator of society's view of an unusually severe punishment is what society does with it." 408 U. S. at 300 (emphasis added). A punishment which is tolerated only because it is rarely imposed, or because the facts and circumstances surrounding its imposition and the evidence of its inutility are generally unknown, or because it is imposed only upon the powerless and members of outcast groups, is not a punishment consistent with contemporary morality. Even in those states which have enacted new capital punishment legislation since Furman, the imposition of the

50/ (Cont'd)
ADMINISTRATION OF JUSTICE. REPORT (THE CHALLENGE OF CRIME IN A FREE SOCIETY) (1967), p. 143.
The extent to which this is true appears upon inspection of the highly reliable figures on executions maintained by the Federal Bureau of Prisons since 1930. Of the 3,859 persons executed under civil authority in the United States between 1930 and 1968, only 191 were executed during the 1960's and only 25 were executed after 1963. No one has been executed in the United States since 1967. UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, Bulletin No. 46, Capital Punishment 1930-1970 (August 1970).

51/ Justice Douglas quoted the conclusion of the President's Commission on Law Enforcement and Administration of Justice that "'the death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups.'" Furman, supra, at p. 249. See also the concurring opinions of Justice Stewart, at p. 310, and Justice Marshall, at pp. 364-366. Justice Marshall noted that "American citizens know almost nothing about capital punishment." Indeed, ignorance of the details of execution is insured by law in that every American jurisdiction now

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death penalty remains, and must continue to remain, a freakishly rare occurrence. Indeed, even in the State of North Carolina, where for fourteen months a purportedly "mandatory" death sentence was put into effect for four relatively common crimes, the number of death sentences was so low that it is impossible to conclude that the penalty was being in a fraction of the cases to which it was theoretically applicable. The legitimacy of its application in a manner which no honest mind can doubt will continue to be freakishly rare in this country--if it continues at all--is therefore called into question.

Third: The growing reluctance to allow the state to take the life of any human being and the absolute refusal to require or tolerate general application of the death penalty reflect not only an increased awareness of the inutility of the punishment, but also a moral development which has produced an increased respect for life and a concomittant revulsion against inflicting the physical and psychological torture of condemnation, inevitably lengthy death row confinement and execution. 52/ Increased respect for

51/ (Cont'd)
forbids public executions. Movements to Abolish the Death Penalty in the United States, 284 ANNALS 124, 127-130 (1952).

52/ ". . . the struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance on the one hand, and, on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century, as well as beliefs in the scientific approach to an understanding of the motive forces of human conduct, which are the result of the growth of the sciences of behavior during the nineteenth and twentieth centuries." SELLIN, THE DEATH PENALTY (1959) 15.

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life and increased respect for the dignity of man inevitably increase the awesomeness of the notion of condemnation and execution. Thus executions, which were once routine occurrences, had ceased for a period of five years even prior to Furman as this nation agonized over the prospect of their resumption and over the inevitable and sobering possibility that human error or a denial of due process could send a man to his death.[53/]

The enormity of the process forbids its resumption without the prior judgment of this Court. If, after a lapse of seven years, the United States is going to return to killing people, this Court should first consider under the relevant Eighth Amendment standards all that that implies.

It is incontrovertible that an impending execution inflicts severe psychological anguish and mental pain upon a condemned man.

Under a legal system which postpones execution for periods measured in years in an attempt to assure its conformity with due process of law, the wait between the imposition of sentence and the actual infliction of death exacts a severe toll.

As the California Supreme Court has pointed out,"the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture." People v. Anderson, 6 Cal.3d 628, 493 P.2d 880, 894 (1972).

53/ See Black, "The Crisis in Capital Punishment" 31 MD. L. REV. 290, at 295-300 (1971).

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The condemned prisoner, even more than the expatriate, is subjected to the "fate of ever-increasing fear and distress." Trop v. Dulles, 356 U. S. 86, 102 (1958) (plurality opinion of Chief Justice Warren). The stress of awaiting execution frequently produces insanity, see Solesbee v. Balkom, 339 U. S. 9, 14 (1950) (Justice Frankfurter, dissenting), or other extreme manifestations of psychological compensation.

Moreover, existing data suggests what imagination intuits: there is likely to be unmeasurable physical pain before consciousness is lost. "Although our information is inconclusive, it appears that there is no method available that guarantees an immediate and painless death." Furman v. Georgia, supra, at 287 (Mr. Justice Brennan concurring).

And there is, finally the enormity and irreversibility of the act of condemning and terminating a human existence -- an act which denies absolutely the very thing which the Eighth Amendment was created to protect: the dignity of man.

The moral development which has accompanied advances in understanding of the causes and control of crime and which is reflected in the increasing world-wide disinclination to impose the punishment of death calls upon this Court now to consider the question of the legitimacy of that punishment under the Eighth Amendment's measure: "the evolving standards of decency that mark the progress of a maturing society."[54/]

54/ Trop v. Dulles, 356 U. S. 86, 100 (1958) (plurality opinion of Chief Justice Warren).

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APPENDIX D

Pp. 49-58, Petition for Certiorari, Eberheart v. Georgia, No. 74-5174 (filed August 19, 1974).

II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE PROVISIONS FOR APPELLATE REVIEW OF DEATH SENTENCES ESTABLISHED BY THE NEW GEORGIA CAPITAL PUNISHMENT STATUTE, GEORGIA LAWS, 1973, PP. 159-172, ACT NO. 74, VIOLATE THE RIGHTS OF AN INDIGENT DEFENDANT TO THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AND TO THE DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The preceding section of this Petition considered the incapacity of Georgia's new appellate review procedures to control or correct the arbitrary capital sentencing practices perpetuated by the State's 1973 death penalty statute in the teeth of Furman v. Georgia. Those appeal procedures are so defective as to raise, in addition, fundamental issues of due process and equal protection and of denial to death-sentenced defendants of the effective assistance of "counsel acting in the role of an advocate," Anders v. California, 386 U.S. 738, 743 (1967), on the question of life or death.

The Georgia Supreme Court is statutorily directed to determine whether a death sentence has been "imposed under the influence of passion, prejudice, or any other arbitrary factor," whether "the evidence supports the jury's or judge's finding of a statutory aggravating circumstance," and "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Ga. Code Ann., §27-2537(c). This mandate

involves the extraordinary feature of an appellate "review" that imports an issue not decided by the lower court and introduces a standard for decision of the appeal which is neither utilized nor utilizable at the trial. For, whereas the Georgia statute nowhere provides any mechanism by which sentencing judges or juries are to ascertain the facts of any cases other than the one before them or to compare that one case with any others, the Georgia Supreme Court is instructed to "accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate," Ga. Code Ann., §27-2537(f); it is authorized to employ a legal assistant to "provide the court with whatever extracted information it desires with respect [to such cases] . . . , including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant," ibid.; and the Georgia Supreme Court, after comparing a condemned appellant's case with "similar cases," Ga. Code Ann. §27-2537(c)(3), is required to "include in its decision a reference to those similar cases which it took into consideration," Ga. Code Ann., §27-2537(e).

Whether or not the Georgia Supreme Court has in fact accumulated records in any or all capital cases -- of what vintage they may be -- whether it has had a legal assistant make any synopses, briefs or extracts -- and, if so, what facts and conclusions they contain -- are all unknown and unknowable. In the three capital cases that it has so far reviewed under the statute, the Georgia Supreme Court has said nothing of any of this, contenting itself with appending to its opinion a list of

earlier cases which it recites that it has "considered."[44] All of those cases are convictions from which appeals were taken resulting in reported decisions, but (1) they do not include all reported decisions in cases of convictions for the particular crime in question following any particular ascertainable date;[45] (2) they include some reported opinions in which the facts surrounding the offense are set forth at length[46] and many in

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44/ See pp. 41-43, supra.

45/ The appendices to the Georgia Supreme Court's opinion in Coley v. State, __Ga.__, 204 S.E.2d 512 (1974) and in petitioner's case did not cite the following rape cases: Penland v. State, 229 Ga. 256, 190 S.E.2d 900 (1972); Riggins v. State, 226 Ga. 381, 174 S.E.2d 908 (1970); Bussie v. State, 230 Ga. 440, 197 S.E.2d 344 (1973); Williams v. State, 226 Ga. 140, 173 S.E.2d 182 (1970); Walker v. State, 226 Ga. 202, 174 S.E.2d 440 (1970). The appendix to the Georgia Supreme Court's opinion in House v. State, __Ga.__, 205 S.E.2d 217 (1974) did not cite the following murder cases: Parks v. State, 230 Ga. 157, 195 S.E.2d 911 (1973); Evans v. State, 227 Ga. 571, 181 S.E.2d 845 (1971); Fisher v. State, 228 Ga. 98, 184 S.E.2d 156 (1971); Banks v. State, 227 Ga. 578, 182 S.E.2d 106 (1971).

46/ See e.g. Watson v. State, 227 Ga. 698, 182 S.E.2d 446 (1971), listed in the appendix to the Georgia Supreme Court's decision in the Coley case and in petitioner's case.

which the facts are described sketchily or not at all;[47] (3) they consist primarily of pre-Furman convictions and sentences and therefore of cases tried under a non-bifurcated procedure in which it would have been wholly adventitious had facts concerning "the defendant"as well as "the crime" been adduced; and (4) the Georgia Supreme Court has not only failed to state the relevant facts of those cases, but has also failed to describe from what source or sources (the appellate opinion, the trial transcript, the trial judge's "report,"[48] the entire trial-court file) it derived those facts.

Such a method of adjudication falls woefully short of anything this Court has ever countenanced in any form of proceeding -- criminal, civil, or administrative -- conducted subject to the Constitution. Several distinct but related constitutional guarantees are flouted here:

First, counsel representing a condemned defendant cannot fairly acquire knowledge of the identity or the facts of the "similar cases" which the Georgia Supreme Court is statutorily

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47/ See e.g. McCrary v. State, 229 Ga. 733, 194 S.E.2d 480 (1972); Miller v. State, 224 Ga. 627, 163 S.E.2d 730 (1968); Grantling v. State, 229 Ga. 746, 194 S.E.2d 405 (1972); Fuller v. State, 228 Ga. 546, 186 S.E.2d 888 (1972); Akins v. State, 231 Ga. 411, 202 S.E.2d 62 (1973), listed in the Appendix to the Georgia Supreme Court's decision in the Coley case and in petitioner's case.

48/ See p. 23, supra.

required to compare to his for the purpose of determining whether his client lives or dies. Neither published opinions nor any other accessible source will enable him to locate in a systematic and comprehensive fashion all of the "similar cases" that should be called to the court's attention by briefing and argument; and, even were the cases somehow to be located, counsel would have no practicable way of obtaining the facts about them that are available to the court, or of knowing or affecting the view that the court takes of those facts or their interpretation or significance.

Counsel for indigent condemned men like petitioner Eberheart are, of course, uniquely disadvantaged, since they lack the resources that would be available to a defendant with means to purchase copies of transcripts in dozens of capital cases for research and comparison. They are therefore denied "the basic tools of an adequate defense or appeal [which] . . . are available for a price to other prisoners," Britt v. North Carolina, 404 U.S. 226, 227 (1971)(dictum), and are denied the equal protection of the laws demanded by an unbroken line of this Court's decisions from Griffin v. Illinois, 351 U.S. 12 (1956), through Mayer v. City of Chicago, 404 U.S. 189 (1971). Lacking access to the "records" which the Georgia Supreme Court will review for comparative purposes, the indigent's statutory right of appellate review of his death sentence (cf. Ross v. Moffitt, 42 U.S.L.W. 4940 (U.S., June 17, 1974)) is reduced to a "meaningless ritual." Douglas v. California, 372 U.S. 353, 358 (1963).

But even for a defendant with means, the appeal of a death sentence involves arguing to the Georgia Supreme Court comparisons of unknown facts under unknowable standards. What synopses of briefs of what versions of what facts in comparative cases are before the court remains unknown to counsel; and the court's standards of comparison as revealed by its opinions and its "Cases Considered" appendices in decisions rendered under the statute (see pp.38-42, supra, at notes 32-35) are about as intelligible as a Roman Emperor's gesture of thumbs-up or thumbs-down beside the arena. "This will never do if hearings and appeals are to be more than empty forms." Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 303 (1937). A judgment based upon "undisclosed sources of information unavailable to others," West Ohio Gas Co. v. Public Utilities Commission (No. 1), 294 U.S. 63, 69 (1935), makes "[t]he right to submit argument . . . a barren one," Morgan v. United States, 304 U.S. 1, 18 (1938), and denies the "'prime requirement of any fair hearing,'" Gonzales v. United States, 348 U.S. 407, 416 (1955). See, e.g. United States v. Abilene & Southern Railway Co., 265 U.S. 274, 286-290 (1924). This sort of procedure not only offends "'the rudiments of fair play,'" West Ohio Gas Co. v. Public Utilities Commission (No. 1), supra, at 71, but also so completely disables counsel from effective representation of his client on the death penalty issue that it destroys the Sixth Amendment right "in any substantial sense," Powell v. Alabama, 287 U.S. 45, 58 (1932). Cf. Ferguson v. Georgia, 365 U.S. 570

(1961); Brooks v. Tennessee, 406 U.S. 605 (1972).[49]

Second, the "similar cases" used by the Georgia Supreme Court for comparison under its statutory mandate consist largely (13 of the 14 cases cited in the "Cases Considered" appendix to the Georgia Supreme Court's opinion in petitioner's case)[50] of sentences meted out by Georgia juries and judges in capital cases prior to Furman -- that is, during a time when, as this Court has already decided, wholly arbitrary capital sentencing discretion was being exercised. Such a practice "calls to life the very conditions which [Furman purported] . . . to destroy," Guinn v. United States, 238 U.S. 347, 361 (1915), and is therefore unconstitutional. Cf. Lane v. Wilson, 307 U.S. 268 (1939).

Third, the universe of cases used for comparison is manifestly irrational. Those cases consist of capital prosecutions in which "records" are available -- which means, as a practical matter, only prosecutions in which appeals were taken, since the

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49/ It is true that this denial occurs at what is nominally the appeal, rather than the trial, of a capital prosecution. However, as was pointed out at p. 50, supra, Georgia procedure makes the Georgia Supreme Court the court of first resort, as well as the court of last resort, for presentation and decision of questions of comparison between a capital defendant's case and "similar cases" for death-sentencing purposes; and it is not conceivable that the Sixth and Fourteenth Amendments could fail to require effective assistance of counsel at this literally vital juncture.

50/ See note 35, supra.

stenographic notes of trial testimony are not transcribed except in the event of an appeal. The upshot is that one capital defendant convicted and sentenced to die may secure a reversal of his death sentence by the Georgia Supreme Court because his case is factually akin to two or three others in which convictions resulting in life sentences were appealed to that Court; whereas another condemned defendant will not secure the reversal of his death sentence notwithstanding the close factual similarity of his case to two or three unappealed convictions resulting in life sentences -- the critical difference in the comparative base depending entirely upon the fortuitous existence of appealable issues relating to guilt in various capital cases with which the particular defendant whose life is at stake has no connection.

Furthermore, in the matter of comparison the cards are stacked in favor of death because the new Georgia statute requires factual findings and a trial judge's report only in cases where a death sentence is imposed, so that the record is more complete in death cases than in life cases whose similarities to a particular condemned defendant's case may be concealed by the absence of findings resolving evidentiary disputes. And, although the Georgia statute requires comparison with "similar cases, considering both the crime and the defendant," Ga. Code Ann., §27-2537(c)(3), the great bulk of cases used for comparative purposes on petitioner's appeal were pre-Furman cases tried under an unitary trial procedure in which evidence relating to "the defendant" apart from "the crime" was admitted haphazardly and

fortuitously in some prosecutions and entirely excluded in others. See, e.g., Knowlton, Problems of Jury Discretion in Capital Cases, 101 U.PA. L. REV. 1099 (1953); Handler, Background Evidence in Murder Cases, 51 J. CRIM. L., CRIM. & POL. SCI. 317 (1960).

These practices raise significant constitutional issues because the Equal Protection Clause denies "to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute," Reed v. Reed, 404 U.S. 71, 75-76 (1971); see also, e.g., Baxstrom v. Herold, 383 U.S. 107 (1966); James v. Strange, 407 U.S. 128 (1972); and the Due Process Clause forbids adjudication of substantial rights on the basis of factual determinations that are not rationally related to the purposes for which the adjudication is made, e.g., Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Leary v. United States, 395 U.S. 6 (1969); Turner v. United States, 396 U.S. 398 (1970). It is no answer to the guarantees of these Clauses that it may be easier or cheaper for the State to make irrational judgments than to undertake the trouble of making rational ones. Rinaldi v. Yeager, 384 U.S. 305 (1966); and see Memorial Hospital v. Maricopa County, 42 U.S.L.W. 4277 (U.S., February 26, 1974). Most imperatively where human life is at issue, a State's procedures for determining when it shall be taken away are required by the Constitution to

exhibit some rational relationship to their professed objectives. If the objective of Georgia's appellate review procedures in capital cases is what the State professes -- to assure regularity and even-handedness in death sentencing and thus to terminate the earlier Georgia practice under which there existed "no meaningful basis for distinguishing the few cases in which [the death penalty was] . . . imposed from the many cases in which it [was] . . . not," Furman v. Georgia, 408 U.S. 238, 313 (1972) (Mr. Justice White, concurring), then the form of those review procedures is palpably irrational in the light of that objective. The only other objective in view -- one to which, admittedly, the new review procedures are quite rationally related -- is to create the appearance of regularity without its reality and thereby to evade Furman's command. See pp. 19-46, supra.